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In The

Supreme Court of the United States

October Term, 1997

MARY McCARTHY, et al.,

Petitioners,

vs.

PROVIDENTIAL CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's final judgment of dismissal is an appealable order under 28 U.S.C. §1291 when the basis for dismissal is that the claims must be arbitrated?

2. Whether the Federal Arbitration Act effects a partial repeal of 28 U.S.C. §1291 by prohibiting appeal of certain final judgments of district courts when they are based upon the holding that the plaintiffs' claims must be arbitrated?

PARTIES

Petitioners Mary McCarthy, Perry and Eunice Williams, John de Ridder, and Eda Kavin, on behalf of themselves and all those similarly situated, were Plaintiffs-Appellants before the Ninth Circuit Court of Appeals. Respondents Providential Corporation, Providential Home Income Plan, Inc., William Texido, and Feroze Waheed, were Defendants-Appellees before the Ninth Circuit.

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I. OPINIONS BELOW

The Court of Appeals opinion is published as *McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997). *See* App. 1a-20a. The Court of Appeals denied rehearing and rehearing en banc on February 25, 1998. App. 42a. The district court opinion and entry of judgment are reported at 1994 U.S. Dist. LEXIS 10122 (N.D. Cal. July 21, 1994). *See* App. 21a-40a and 41a.

II. BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit entered judgment on August 20, 1997. App. 1a. Plaintiffs' timely petition for rehearing was denied on February 25, 1998. App. 42a. This Court has jurisdiction under 28 U.S.C. §1254(l).

III. STATUTES AND RULES

28 U.S.C. §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

9 U.S.C. §3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the

agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. §16. Appeals

(a) An appeal may be taken from –

(1) an order –

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order –

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

IV. STATEMENT OF THE CASE

A. Introduction

The Circuit Courts of Appeal are sharply divided on the question whether a district court's final judgment of dismissal is an appealable order under 28 U.S.C. §1291 when the basis for dismissal is that the claims must be arbitrated. The Sixth and the Tenth Circuits hold that these dismissals present appealable final judgments. *See, e.g., Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (10th Cir. 1995); *Arnold v. Arnold Corp.-Printed Communications for Bus.*, 920 F.2d 1269, 1274-75 (6th Cir. 1990). To the contrary, the Fifth, Eighth – and now the Ninth – Circuits hold that they lack jurisdiction over appeals from most orders of dismissal in deference to arbitration, even if the order completely ends the district court litigation. *See, e.g., Altman Nursing v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994). In this case, a divided panel of the Ninth Circuit held that a separate, final judgment compelling arbitration and closing the district court's file was not appealable under 28 U.S.C. §1291 because Sections 16(a)(3) and (b)(2) of the Federal Arbitration Act ("FAA") – which preserves appeals of "final decisions" – purportedly deem this judgment "interlocutory and unappealable." App. 6a.

The case thus presents a clear and irreconcilable conflict among the circuits on important questions of federal appellate jurisdiction and procedure and the interrelationship between two statutes.

B. Factual And Procedural Background

1. District Court

Plaintiffs filed a class action in the United States District Court for the Northern District of California on behalf of a class of senior citizens who purchased so-called "reverse mortgages" from defendant Providential Corp. ("Providential") and its agents.[1] The elderly plaintiffs – Mary McCarthy (age 88), Perry and Eunice Williams (ages 90 and 84, respectively), John de Ridder (executor of his deceased mother's estate), and Eda Kavin (age 79) – sought redress for injuries resulting from their purchases of Providential's reverse-mortgage products during the period October 1, 1988 to April 22, 1994. The Complaint alleged numerous legal violations in the marketing and sale of the reverse mortgages, including violations of the Truth in Lending Act, 15 U.S.C. §§1601, *et seq.*, as well as supplemental claims under California state law. *See* App. 23a. The Complaint charged that defendants engaged in unlawful practices that deceived unsophisticated and inexperienced elderly borrowers. Providential

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[1] Providential sold "reverse mortgage" loans to qualifying senior citizen homeowners. The loans supplemented a borrower's income by providing her with monthly, tax-free cash advances. Repayment of the principal and interest was deferred for as long as the borrower remained in her home. In exchange, the homeowners conveyed to Providential a deed of trust for equity in the home equal to the amount borrowed, plus interest. The deed granted Providential the power of sale should the borrower default on her payment when it became due. App. 22a.

and its agents allegedly misrepresented the reverse mortgages' interest rates, finance charges, the borrower's life expectancy, and the arbitration provisions – all material terms of the mortgages. The senior citizens were thereby deprived of the information necessary to make informed decisions regarding the cost of credit, and the class was caused millions of dollars in losses. Plaintiffs sought both damages and injunctive relief, and the district court had jurisdiction to hear the case pursuant to 15 U.S.C. §1640(e).

Defendants responded by moving to compel arbitration *on an individual basis*, asserting that a clause in the reverse mortgages' documentation was an enforceable agreement to arbitrate. Defendants argued that each plaintiff in the class had to arbitrate his or her claim individually because the arbitration clause did not explicitly permit arbitration on a class-wide basis. App. 36a.

Plaintiffs countered by challenging the scope and applicability of the arbitration clause, asserting that their claims arose out of disclosure statements and marketing materials other than the "loan documents" covered by the clause. Plaintiffs also asserted several defenses to arbitration which presented factual issues that must be decided by a jury, and thus could not be resolved on the pleadings and attendant motions. For example, plaintiffs alleged there was no "meeting of the minds" on the material terms of the contracts, and presented evidence that they had not intended to arbitrate potential disputes. Plaintiffs asserted that defendants had an obligation to disclose to the elderly class members the material terms of the reverse mortgages, including the arbitration provision. Plaintiffs pointed out that the arbitration provision was

set in small type, and buried in the least-important section of the documentation – making it incapable of ready understanding and interpretation by the elderly class members. Finally, plaintiffs asserted that compelling individual arbitrations would exacerbate the injuries already suffered by them. They conservatively estimated that individual arbitrations would cost the elderly class members $2,500 each – a total of $3.75 million for the proposed class – merely to gain access to the arbitral system.

The district court nonetheless granted defendants' motion to compel arbitration, and dismissed the case in its entirety. App. 39a. Leaving no doubt about its intention to terminate rather than merely stay the proceeding pending the individual arbitrations, the court entered final judgment in a separate document pursuant to Federal Rules of Civil Procedure 58 and 79. App. 41a. That final judgment states: "JUDGMENT[:] This action is dismissed for the reasons set forth in the accompanying order. The Clerk of the Court shall close the file." App. 41a.

2. The Court Of Appeals

Plaintiffs appealed the district court's judgment to the Ninth Circuit. They asserted that the lower court had erred by applying only federal common law standards to defendants' motion to compel arbitration, compelling arbitration, improperly resolving factual issues, and destroying plaintiffs' only effective remedy – a class action – for the claimed wrongs. The Ninth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. §1291.

The parties fully briefed the arbitrability issues, without perceiving or raising any issues of appellate jurisdiction. It was not until 16 months after oral argument that the Ninth Circuit *sua sponte* questioned its own appellate jurisdiction, directing the parties "to submit simultaneous supplemental letter briefs . . . addressing whether or not the district court's order in this case is an *interlocutory* order and whether this appeal is prohibited by 9 U.S.C. §16(b)(2)." App. 43a (emphasis added).[2] The court's order also directed the parties to "discuss the holding in *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994), as it relates to our jurisdiction to hear this appeal." *See* App. 43a. In *Gammaro*, the Eighth Circuit, faced with a case of first impression, relied upon 9 U.S.C. §16(b)(2) and held that it lacked jurisdiction over an appeal from an order compelling arbitration and dismissing the case. *Id.* at 94. Having labeled the dismissal as "interlocutory," the Eighth Circuit refused to consider the plaintiff's separate argument for jurisdiction under 28 U.S.C. §1291, explaining that "our construction of 9 U.S.C. §16 precludes that argument." *Id.* at 96.

The parties submitted supplemental briefing, as requested. Plaintiffs argued that under *Arnold*, 920 F.2d at 1274-75, the district court's dismissal and entry of judgment clearly evidenced the district court's intention to terminate the proceeding, thus making the order final and appealable under *both* 28 U.S.C. §1291 and 9 U.S.C.

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[2] Although Section 16(a)(3) allows appeals from "final decision[s]," Section 16(b)(2) prohibits appeals of "interlocutory" orders directing arbitration to proceed. *See* 9 U.S.C. §§16(a)(3) and 16(b)(2).

§16(a)(3). Plaintiffs noted that, under Section 3 of the FAA, the district court could have chosen – but did not – to retain its jurisdiction over the parties by ordering a stay, which would render its order nonappealable. Instead, the district court dismissed plaintiffs' case, entered judgment, and ordered the clerk to close the file. App. 39a, 41a. In their supplemental briefing, defendants cited decisions from two circuits holding that dismissals in deference to compelled arbitrations were not appealable under Section 1291, but acknowledged that the Sixth and Tenth Circuits had held to the contrary in *Arnold* and *Armijo*.

On August 20, 1997, a divided Ninth Circuit panel issued its opinion, with the two-judge majority holding that it had no appellate jurisdiction to review the final dismissal of plaintiffs' case. App. 8a. Judge Brunetti's majority opinion concluded that, notwithstanding the entry of a final judgment following the order of dismissal and the clear language of 28 U.S.C. §1291 providing appellate jurisdiction over final judgments, Section 16 of the FAA deprived the court of jurisdiction. App. 4a, 6a. The opinion noted the division among the courts of appeals regarding the interplay between 28 U.S.C. §1291 and the FAA, and decided to follow the Fifth and Eighth Circuits. App. 6a-7a.

Judge Pregerson dissented, arguing that the contrary views of the Sixth and Tenth Circuits were better reasoned and should be followed. App. 15a-16a. He believed that the court below clearly had jurisdiction under 28 U.S.C. §1291 because the case had been dismissed and judgment entered. App. 15a. Judge Pregerson also pointed out the crucial distinction between a stay order,

which is ordinarily not appealable, and a final dismissal, which is:

> By ignoring the distinction between a stay and a dismissal and treating the dismissal in this case as interlocutory, the majority creates a jurisdictional loophole that unjustifiably precludes immediate appeal in cases where the arbitrability issue is embedded but the action is dismissed rather than stayed.

App. 18a.

Because plaintiffs' timely petition for rehearing and suggestion of rehearing en banc was denied by the Ninth Circuit on February 25, 1998, App. 42a, this petition for a writ of certiorari is timely filed. S. Ct. Rule 13(1).

V. ARGUMENT

The decision below warrants this Court's review because the courts of appeals are in disarray on an important question of federal appellate jurisdiction and procedure: whether a final judgment entered following a complete dismissal on the ground that the action should be arbitrated is an appealable order. Stated differently, the courts of appeal are divided over the interplay between the two federal statutes: whether the FAA effects an implied partial repeal of the grant of appellate jurisdiction over final judgments given by 28 U.S.C. §1291.

Section 1291 provides, in relevant part, that the federal "courts of appeals . . . *shall have jurisdiction of appeals from all final decisions* of the district courts of the United States." 28 U.S.C. §1291 (emphasis added). The FAA also allows appeals from "final decisions": Section 16(a)(3)

provides for appeals from "a final decision with respect to an arbitration that is subject to this title," 9 U.S.C. §16(a)(3), while Section 16(b)(2) forbids appeals from "interlocutory" orders. 9 U.S.C. §16(b)(2). Thus, the two federal statutes are not necessarily incompatible with each other, although the Fifth, Eighth, and Ninth Circuits apparently believe that Section 16(b)(2) of the FAA partially overrides Section 1291.

The questions presented by this petition pose important considerations of judicial certainty, the administration of justice, the proper interpretation and accommodation of two federal statutes, and the rights of plaintiffs to seek effective and timely appellate review of erroneous decisions dismissing claims. The division between the Fifth, Eighth, and Ninth Circuits on the one hand, and the Sixth and Tenth Circuits on the other, is firmly entrenched, and cannot be resolved without direction by this Court, the "ultimate expositor of the meaning of the federal constitution and statutes."[3]

A. The Courts Of Appeals Are Deeply Split

As noted above, the Sixth and Tenth Circuits hold that final dismissal of an action in deference to arbitration is appealable under 28 U.S.C. §1291. In *Arnold*, 920 F.2d 1269, the Sixth Circuit held that it had jurisdiction to hear an appeal of a district court's order directing the parties to proceed to arbitration, even though the arbitrability

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[3] Arthur D. Hellman, *The Supreme Court, The National Law, And The Selection Of Cases For The Plenary Docket*, 44 U. Pitt. L. Rev. 521, 522 (1983).

issue was not independent of the securities violations alleged in the underlying suit. *Id.* at 1275-76. The court offered two justifications for the result: first, the district court's order was not "interlocutory," having dismissed the Complaint "in its entirety" while denying defendants' motion to stay the action pending arbitration as "moot." *Id.* at 1275. Second, the court found the FAA's legislative history "dispositive," as the Senate Committee on the Judiciary had explicitly stated when amending the Act in 1988, "Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration . . . or *a final judgment dismissing an action in deference to arbitration.*" *Id.* at 1274-75 (emphasis in original).[4] The Senate Committee specifically noted that these appeals " 'preserve the general policy that appeal should be available when there is nothing left to be done in the district court.' "[5]

The Tenth Circuit similarly held that it had jurisdiction under Section 1291 to hear an appeal of a final order compelling arbitration in *Armijo*, 72 F.3d at 797. Again, the decision turned on the fact that the district court compelled arbitration and *dismissed* the action rather than *ordering a stay* of the proceedings. *Id.* Thus, the district court's order granting defendants' motions was "clearly a final order, permitting" the Tenth Circuit to exercise jurisdiction. *Id.*

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[4] Quoting *Committee on the Judiciary, Section by Section Analysis on S1482*, 100th Cong., 2d Sess., 134 Cong. Rec. S16284, Oct. 14, 1988 (emphasis added).

[5] *Id.* (quoting *Committee on the Judiciary, supra* at S16309).

Three other circuits have refused to acknowledge the differences between stays and dismissals in the context of orders compelling arbitration, with the court below going so far as to reject that distinction as "rigid and formulaic." App. 8a. The Ninth Circuit followed the Fifth and Eighth Circuits in holding that even a final dismissal and entry of judgment in favor of arbitration is not "final" under Section 1291 unless the motion to compel arbitration is the only claim before the district court. The decision of the panel majority turned on its belief that, when the arbitration issue is "embedded" (*see* below), *all* orders compelling arbitration – even patently final ones like the one in this action – are deemed "interlocutory." App. 6a.

Part of the confusion among the circuits on this question appears to stem from a perceived distinction between "independent" and "embedded" motions to compel arbitration. *See* App. 4a. "Independent" proceedings are lawsuits in which the sole claim before the court is the arbitrability of the dispute. *McDermott Int'l v. Underwriters at Lloyds*, 981 F.2d 744, 747 (5th Cir. 1993). Some courts regard a decision to compel arbitration in an "independent" proceeding to permit appellate review under 9 U.S.C. §16(a)(3). *Id.* "Embedded" proceedings are actions in which a dispute over arbitrability is only part of a broader dispute before the court. *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). (The FAA does not speak of either "embedded" or "independent" proceedings; the distinction has been fabricated by a few federal courts.) A decision to compel arbitration in an "embedded" situation is not, in and of itself, appealable.[6]

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[6] *See, e.g., Gammaro*, 15 F.3d at 95.

But some courts have extended this principle one step further, holding that an order compelling arbitration in an "embedded" proceeding is not appealable even if the order is a final judgment. *See, e.g.*, App. 5a; *see also Altman Nursing*, 84 F.3d at 772. Other courts disagree, relying on Section 1291.[7]

The two-judge majority below followed *Gammaro*, 15 F.3d at 95-97, in which the Eighth Circuit held that it lacked jurisdiction over an appeal from what it called an interlocutory order compelling arbitration. *Id.* at 94. The Eighth Circuit refused to consider the plaintiff's separate argument that jurisdiction existed under 28 U.S.C. §1291, explaining that "our construction of 9 U.S.C. §16 precludes that argument." *Id.* at 96. In effect, the Eighth Circuit held that the Federal Arbitration Act operates as a partial repeal of 28 U.S.C. §1291, even though Section 1291 states that the courts of appeals "*shall* have jurisdiction" over "*all*" final decisions of the district courts of the United States. 28 U.S.C. §1291 (emphasis added). The Eighth Circuit's holding, of course, contravenes the maxim that "legislative repeals by implication will not be recognized, insofar as two statutes are capable of coexistence, 'absent a clearly expressed congressional intention to the contrary.' " *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) (citation omitted).

The Fifth Circuit in *Altman Nursing* likewise rejected *Arnold* and followed *Gammaro*. *See Altman Nursing*, 84 F.3d at 771 (criticizing *Arnold*). Like *Gammaro*, the *Altman*

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[7] *See Armijo*, 72 F.3d at 797; *Arnold*, 920 F.2d at 1276.

Nursing panel was not swayed by the fact that the underlying order completely ended the litigation and therefore constituted an appealable final order: "We disagree. . . . An order involving an embedded proceeding *is always* an interlocutory order; an order involving an independent claim is always final."[8] *Id.* (emphasis added). Thus, there is an irreconcilable division among the circuits.

The decision below (and those of the Fifth and Eighth Circuits) appears to be inconsistent with this Court's jurisprudence regarding the plain meaning of Section 1291. This Court recently reaffirmed the plain and simple meaning of finality under that statute in *United States v. Jose*, 519 U.S. 54, 117 S. Ct. 463 (1996), when it reversed

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[8] The other decisions cited by the majority below do not reach the question presented, as they do not involve dismissals or judgments. For example, in *American Cas. Co. v. L-J, Inc.*, 35 F.3d 133 (4th Cir. 1994), the Fourth Circuit noted that the district court's order was interlocutory and nonappealable because it had "*stayed* the litigation." *Id.* at 138 (emphasis added). Another Fourth Circuit decision, *Stedor Enter., Ltd. v. Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991), appears to hold that the FAA does not undermine Section 1291 appellate jurisdiction over final orders because Congress did not define the terms "interlocutory" or "final" in the FAA. *Stedor* concludes that Section 16(a)(3) of the Act requires "courts to *continue* the prior, settled usage" of the term "final" decision; *i.e.*, " 'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Stedor*, 947 F.2d at 731 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)) (emphasis added). Similarly, *Filanto* held an order compelling arbitration nonappealable because the district court *specifically* "declined to dismiss the complaint." 984 F.2d at 61. The Second Circuit acknowledged that it was "arguable" that, had the complaint been dismissed with finality, "an appeal would be immediately available." *Id.* at 61 n.3.

the Ninth Circuit's dismissal of an appeal for lack of jurisdiction, and held that the Ninth Circuit had improperly injected a different concept (ripeness) into its jurisdictional analysis. As this Court stated, "[f]inality, not ripeness, is the doctrine governing appeals from district court." *Id.* at 465.

The Ninth Circuit has ignored the plain statutory text of both Section 1291 and the FAA. If Congress intended the FAA to modify the meaning of "final decisions" under Section 1291, it would have said so. *See Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 177 (1994) (Congress knows how to place express language in statutory text).

B. The Questions Presented Are Important To The Administration Of Justice And To The Rights Of Plaintiffs To Seek Effective And Timely Review Of Erroneous Decisions Dismissing Complaints

This Court has granted certiorari when an intercircuit conflict exists and "a considerable number of suits are pending in the lower courts which will turn on [its] resolution." *See Massachusetts Trustees of Eastern Gas & Fuel Assoc. v. United States*, 377 U.S. 235, 237 (1964). That rationale is apropos to this case. It is well known that arbitration clauses are becoming more prevalent in contracts of all types.[9] As a direct result, disputes over arbitrability also continue to grow. Increasingly, civil actions

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[9] *See, e.g.*, Harold Brown, *Alternative Dispute Resolution: Realities and Remedies*, 30 Suffolk U. L. Rev. 743, 745 (1997) (noting increasingly common arbitration clauses in agreements

are met with motions to dismiss, or to stay, based upon an asserted obligation to arbitrate, with resulting confrontation on that and other issues. Indeed, hundreds of these disagreements arise each year, and several have reached this Court in recent years.[10]

When motions seeking arbitration are resolved, clear rules regarding appealability are crucial. This Court has recognized the need for clarity regarding finality and appealability. *See United States v. Indrelunas*, 411 U.S. 216 (1973). In *Indrelunas*, this Court held that Fed. R. Civ. P. 58's "separate document" provision "must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered." *Indrelunas*, 411 U.S. at 221-22. The Court observed that the rule might be

> "subject to criticism for its formalism were it not for the fact that something like this [is] needed to make certain when a judgment becomes effective, which has a most important bearing, *inter alia*, on the time for appeal and the making of post-judgment motions that go to the finality of the judgment for purposes of appeal."

Id. at 220-21 (quoting 6A J. Moore, *Federal Practice* ¶58.04 [4-2], at 58-161 (1972)). Rather than adopting the bright lines set forth in both the FAA and Section 1291, the court below utilized an obscure and confusing test: allowing appealability to turn on the questionable distinction

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involving, *inter alia*, stockbrokers, banks, franchisors, and employer/employee relationships).

[10] *See, e.g., First Options v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

between "embedded" and "independent" proceedings that has no basis in either statute.

Litigants should be given clear rules as to when they can (or must) file a notice of appeal. Civil litigants ordered to arbitrate claims they believe are non-arbitrable are entitled to expeditious judicial review of that question, or, at a minimum, to clear and understandable principles of appellate jurisdiction.

Finally, the decision below creates a unique category of district court order: a final order of dismissal accompanied by a separate judgment that nonetheless is nonappealable. The creation of such a previously unknown class of judgments in derogation of the plain language of Section 1291 presents an important question warranting this Court's attention. Only this Court, with its unique responsibility for overseeing the lower federal courts, can competently resolve the conflict in the interpretation of *two* federal statutes. Harmonization of the statutes and unification of practice in the federal courts is needed.

VI. CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

DATED: May 22, 1998

Respectfully submitted,

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Mary McCARTHY; Perry Williams; Eunice Williams, Plaintiffs-Appellants,

v.

PROVIDENTIAL CORPORATION; Providential Home Income Plan, Inc.; William J. Texido; Feroze A. Waheed, Defendants-Appellees.

No. 94-16384

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 6, 1995.

Decided Aug. 20, 1997.

Edward M. Gergosian, Barrack, Rodos & Bacine, San Diego, California, for plaintiffs-appellants.

David S. Steuer, Sarah A. Good, Wilson, Sonsini, Goodrich & Rosati, Palo Alto, California, for defendants-appellees.

Appeal from the United States District Court for the Northern District of California; Fern M. Smith, District Judge, Presiding. D.C. No. CV-94-00627-FMS.

Before: PREGERSON, BRUNETTI, and T.G. NELSON, Circuit Judges.

Opinion by Judge BRUNETTI; Dissent by Judge PREGERSON.

BRUNETTI, Circuit Judge:

The plaintiffs in this case are a group of senior citizen homeowners who entered into "reverse mortgage" loan

agreements with the defendants. Alleging that the defendants misrepresented several key terms of the agreements, the plaintiffs filed a class-action lawsuit asserting Truth in Lending Act and various state-law claims. The district court, finding that the loan agreements contained valid arbitration provisions, ordered the individual plaintiffs to separately submit their claims to arbitration, and dismissed the plaintiffs' complaint. We hold that Congress has eliminated our jurisdiction to review this case under the Federal Arbitration Act. *See* 9 U.S.C. § 16(b). Thus, we dismiss this appeal without prejudice to a later timely, appeal.

BACKGROUND

Defendants/Appellees, collectively referred to as "Providential," sell reverse mortgage loans to qualifying senior citizen homeowners. These loans are made in monthly installments, and are meant to supplement the senior citizen's income. Repayment of the principal and interest is deferred for as long as the borrower remains in his or her home. In exchange, the homeowner conveys to Providential a deed of trust for equity in the home equal to the amount borrowed plus interest. The reverse mortgage agreements consist of a deed of trust, a loan agreement, and a note. Providential also provided customers with other documents, including a Truth in Lending Act disclosure statement and promotional materials.

Plaintiffs/Appellants are or represent individuals who "bought" Providential's reverse mortgage loans. Because Appellants allege to have incurred substantial costs in their dealings with Providential that were not

disclosed in (or were contrary to) the terms of the loan documents, they filed a class action lawsuit on behalf of themselves and all similarly situated senior citizen homeowners, alleging causes of action for violations of the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. ("TILA"), fraud, negligent misrepresentation, and state-law statutory violations.

Asserting that the deeds of trust executed by Appellants contain an enforceable arbitration provision, Providential filed a motion to compel arbitration on an individual basis pursuant to section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4. The district court granted Providential's motion, ordering Appellants to submit their claims to arbitration on an individual basis. Because the court concluded that it did not have the power to order the arbitration to proceed on a consolidated or class-wide basis, it declined to make such an order and dismissed Appellants' pending class certification motion as moot. Furthermore, because the court concluded that none of Appellants' claims remained to be resolved by the court, it decided to dismiss, rather than stay, the action.

Appellants contend that the district court's ruling was erroneous because: (I) they did not agree to arbitrate their claims; (II) any arbitration agreement that was formed is voidable under the contract doctrines of fraud, adhesion, unconscionability, and illegality; and (III) the district court does have the power to order arbitration to proceed on a consolidated or class-wide basis. However, because we dismiss this appeal on a jurisdictional basis, we do not reach these issues.

STANDARD OF REVIEW

Decisions regarding the validity and scope of arbitration agreements are reviewed de novo. *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139 (9th Cir. 1991).

DISCUSSION

Appellants contend that we have jurisdiction over this appeal under both 9 U.S.C. § 16(a)(3), as "a final decision" compelling arbitration, and as a final judgment appealable pursuant to 28 U.S.C. § 1291. However, as the appellees correctly state, Congress has set forth special rules governing appeals from a district court's arbitration order. Here, they argue, 9 U.S.C. § 16(b)(2) prohibits review of the district court's decision.

Section 16(b)(2), inter alia, prohibits appeals from interlocutory orders compelling arbitration to proceed under section 4. Thus, section 16(b)(2) bars review of the district court's decision unless the court's order can be characterized as a "final decision" pursuant to section 16(a)(3) or falls within one of the exceptions found in 16(a)(1) or (2).

When examining a district court's order compelling arbitration and dismissing the case under section 16, we must first determine whether the case involves an "independent" or "embedded" motion. *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994). As we stated in *Prudential*:

> [I]f the motion to compel arbitration in a given case is the only claim before the district court, a

> decision to compel arbitration is deemed to dispose of the entire case, and permit appellate review under 9 U.S.C. § 16(a)(3). On the other hand, if the motion to compel arbitration is "embedded" in a substantive suit pending before that court, the district court's decision to compel arbitration of some or all of the claims before it is not considered to be final, and therefore not reviewable.

Prudential, 42 F.3d at 1302 (citations omitted) (holding that federal action to compel arbitration in state court sexual harassment and discrimination claims was independent proceeding).

Although *Prudential* set forth the framework for analyzing this type of claim, it did not consider the precise issue presented here. However, the Eighth Circuit has considered a case nearly identical to ours. *See Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994). In *Gammaro*, the panel held that it lacked jurisdiction over an appeal from an order compelling arbitration in a suit alleging Truth in Lending Act violations.[1] *Id.* at 95-97. The court held that such an order was interlocutory and could not be reviewed directly by the appellate courts. *Id.* The court also held that because such an order is not a "final decision" under section 16(a)(3), it also is not an appealable final decision under 28 U.S.C. § 1291. *Id.*

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[1] As with this case, the arbitration agreement was not located in the disclosure statement; instead the loan agreement provided for arbitration. *Id.* at 95.

Here, the plaintiffs' Truth in Lending Act claim constituted the primary suit and, as in *Gammaro*, the defendant's motion to compel arbitration was an embedded proceeding. The reasoning presented in *Gammaro* is consistent with our holding in *Prudential* and we elect to follow the Eighth Circuit's decision.[2] Consequently, we deem this appeal to be interlocutory for the purposes of section 16(b)(2) and hold that we lack jurisdiction to consider it.

This analysis has been followed by the majority of courts examining the issue of interlocutory appeals under section 16. *See, e.g., F.C. Schaffer & Assocs. Inc. v. Demech*

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[2] This analysis is supported by the practice commentary to 9 U.S.C. § 16:

> When for example, a decision about the arbitrability of an issue arises in an ordinary action in a U.S. district court, such as on a motion by one of the parties to stay the action and compel the arbitration of its issues, the decision in that context is merely interlocutory: the action, whichever way the court may rule on the motion, is not finally determined and the decision therefore qualifies as just an intermediate one. As such, it would not be appealable unless it fell under one of the exceptions listed in § 1292(a). Since it does not fall under any of those exceptions, an appeal from the arbitrability ruling would be barred.
>
> * * *
>
> Section 16 effectively addresses this "embedded" proceeding by explicitly allowing an immediate appeal from an anti-arbitration decision wile [sic] precluding an appeal when the decision is in favor of arbitration.

David D. Siegal, Practice Commentary, 9 U.S.C. § 16 at 353 (West Supp. 1997).

Contractors, Ltd., 101 F.3d 40, 42-3 (5th Cir. 1996) (dismissing appeal from district court's order compelling arbitration for lack of jurisdiction); *American Cas. Co. of Reading, Pennsylvania v. L-J, Inc.*, 35 F.3d 133, 135-39 (4th Cir. 1994) (same); *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). *But see Armijo v. Prudential Ins. Co. of America*, 72 F.3d 793, 797 (10th Cir. 1995) (holding that dismissal as a result of order to compel arbitration presents an appealable final decision); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1276 (6th Cir. 1990) (same). It is also supported by a plain reading of the statute and the attached practice commentary. *See* 9 U.S.C. § 16.

The dissent argues that our reliance on the above cases is misplaced because those cases involved stays rather than dismissals of actions. However, we reject this distinction because it is irrelevant to the ultimate disposition of the cases and ignores the clear dictates of the FAA. As the Second Circuit noted in *Gammaro*:

> Although the district court's dismissal of the class allegations may evade review if Gammaro does not later seek such review [of the arbitrator's decision], this situation does not differ significantly from that of a litigant seeking to represent a class in any other type of litigation. An order denying class certification routinely forced individuals to litigate their individual claims before arriving at a final decision subject to review.

15 F.3d at 96; *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978). Here, as in *Gammaro*, the plaintiffs must arbitrate their claims before seeking review. Our action today certainly does not

deprive the plaintiffs of any review which they may later seek.

The dissent eloquently articulates the procedural differences between stays and dismissals, but this interpretation adopts a rigid and formulaic interpretation of a statute which makes no distinction between the two. The dissent ignores the clear language of section 16 prohibiting review of orders compelling arbitration. Further, distinguishing between stays and dismissals for purposes of appellate review would condition the result upon the district court's decision. If circumstances compelled the court to stay the action, the case would proceed to an arbitrator; if the court dismissed all claims the case could be appealed immediately. We do not believe that Congress intended this arbitrary result when it barred appellate review of interlocutory orders compelling arbitration. We interpret the bar on appellate review to be just that, regardless of the terminology used by the trial court.

Finally, our interpretation of section 16 corresponds with Congress's clear desire to promote greater use of arbitration. *See Gammaro*, 15 F.3d at 96; *see also* David D. Siegal, Practice Commentary, 9 U.S.C. § 16 at 352-53 (West Supp. 1997) (Section 16 "is a pro-arbitration statute designed to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration."). We acknowledge and agree with the dissent's concerns about the potential harshness of the arbitration requirement. However, the language of the statute is clear: we have no jurisdiction to review the district court's decision at the present time. We stress again that we are not precluding review of the district court's order

compelling arbitration; we are merely postponing it until the arbitration proceeding has run its course.

For the reasons stated above, we dismiss for lack of jurisdiction.

DISMISSED.

PREGERSON, Circuit Judge, dissenting.

I dissent because the majority opinion wrongly deprives the senior citizens of their right to an appeal. The majority erroneously treats a final dismissal as an interlocutory stay and concludes that this court lacks jurisdiction. In my view, the district court's order compelling arbitration and dismissing the action was a final, appealable decision. This court therefore has jurisdiction to consider the appeal under 9 U.S.C. § 16(a)(3).

From the outset of this appeal, the parties treated the district court's decision as an appealable final order. During oral argument in December 1995, we also treated the district court's decision as an appealable final order. Today the majority concludes that we lack jurisdiction over what originally was and still remains a final dismissal of all claims before the district court.

I. BACKGROUND

Plaintiffs in this case include Mary McCarthy, age 88, Perry and Eunice Williams, ages 90 and 84, respectively, John de Ridder, as executor of the Estate of his mother who died at age 93, and Eda Kavin, age 79. These senior citizens took out "reverse mortgages" with Providential. Their complaint alleges that Providential engaged in

practices which were both unlawful and designed to deceive unsophisticated and inexperienced elderly borrowers. According to the senior citizens' complaint, Providential and its agents misrepresented the interest rate and finance charges of the reverse mortgages, and also misrepresented the borrowers' life expectancies and the impact of the arbitration provision. Regarding the arbitration provision, the senior citizens allege that Providential buried this requirement among more than twenty-five pages of legal-sized, fine print documents provided to elderly borrowers.

The senior citizens brought a Truth in Lending Act ("TILA") claim, 15 U.S.C. §§ 1601-1667(f), and several state law claims in federal district court. TILA permits class actions, *id.* § 1640(a)(2)(B), and the senior citizens sought class certification to represent others who were allegedly victimized in Providential's "reverse mortgage" scheme.

In response to the senior citizens' complaint Providential filed a motion to compel arbitration on an individual basis. In July 1994, the district court issued an order that compelled the parties to submit their claims to arbitration. Relying on our decision in *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 636-37 (9th Cir.), *cert. denied*, 469 U.S. 1061, 83 L.Ed.2d 431, 105 S.Ct. 544 (1984), the district court concluded that "the court cannot compel arbitration on a class basis where the agreement did not specifically provide for it." The district court dismissed the senior citizens' motion for class certification, and vacated the scheduled hearing date for the class certification motion.

The district court noted that:

> Normally, under 9 U.S.C. § 3 [of the Federal Arbitration Act], a court would stay proceedings pending the conclusion of the arbitration. . . . However, in the present case, none of plaintiffs' claims remain to be resolved by this court, and therefore there is no reason to stay these proceedings pending the arbitrator's decision.

Accordingly, the Clerk of the Court was ordered to close the file.

Our jurisdiction in this case arises from 28 U.S.C § 1291, which provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." As the Supreme Court stated in *Catlin v. United States*, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945), "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." 324 U.S. at 233, 65 S.Ct. at 633. Nothing in the Federal Arbitration Act ("FAA") deprives us of our jurisdiction over final judgments:

> Under the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration . . . or a final judgment dismissing an action in deference to arbitration. These appeals preserve the general policy that appeal should be available where there is nothing left to be done in the district court.

Stedor Enters., Ltd. v. Armtex, Inc., 947 F.2d 727, 731 (4th Cir. 1991) (quoting 134 Cong. Rec. S16309 (daily ed. Oct. 14, 1988)).

II. EMBEDDED PROCEEDINGS ARE NOT NECESSARILY INTERLOCUTORY

In *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S.Ct. 61, 133 L.Ed.2d 24 (1995), we distinguished between "embedded" and "independent" arbitrability proceedings in determining whether an order compelling arbitration was a final decision. *Id.* at 1302. A proceeding is "independent" when "the motion to compel arbitration . . . is the only claim before the district court." *Id.* By contrast, a proceeding is "embedded" if the motion to compel arbitration is " 'embedded' in a substantive suit pending before that court." *Id.* The embedded/independent distinction has been employed by many circuits considering the finality of orders compelling arbitration. Admittedly, the arbitrability determination in this case is an embedded proceeding, not an independent proceeding. The majority opinion, however, mechanically applies the embedded/independent distinction to arrive at a result that is without logical support.

It is well-settled that an order by the district court in an *independent* action to compel arbitration is a final decision for the purposes of 9 U.S.C. § 3. *See, e.g., Prudential Ins. Co.*, 42 F.3d at 1302 ("[E]very court that has considered the issue to date has concluded that if the motion to compel arbitration in a given case is the only claim before the district court, a decision to compel arbitration is

deemed to dispose of the entire case, and permit appellate review under 9 U.S.C. § 16(a)(3)."). This doctrine makes sense; the district court's order compelling arbitration in an *independent* proceeding will necessarily dispose of the only issue before the court. Therefore, an order compelling arbitration in an independent proceeding will always be a final, appealable decision.

While orders compelling arbitration in all independent arbitrability proceedings are necessarily final decisions, it does not logically follow that orders in all *embedded* arbitrability proceedings are necessarily interlocutory. Admittedly, most orders in embedded proceedings are interlocutory. These orders are not interlocutory, however, simply because they are embedded. Rather, orders compelling arbitration from embedded proceedings are usually interlocutory because the FAA allows the district court to stay the action pending the outcome of arbitration. *See* 9 U.S.C. § 3. The district court here acknowledged that the standard practice is for a district court to grant a stay pending arbitration. When a district court follows the standard practice of staying the action pending the outcome of the ordered arbitration, that court has not made a "final decision" regarding all issues before it. *Id.* § 16(a)(3). Under these circumstances, the arbitration order is appropriately deemed interlocutory.

The district court in this case, however, consciously chose to depart from the standard practice of staying the action and disposed of all the issues before it with its order compelling arbitration. This order dismissed the entire action and operated "as an adjudication upon the merits." Fed. R. Civ. P. 41(b). This court and other circuits have pointed out that the disposition of all issues before

the district court and the adjudication of the merits of the action are characteristics of an appealable final decision. *See Amgen, Inc. v. Kidney Ctr. of Del. County, Ltd.*, 95 F.3d 562, 566 (7th Cir. 1996) (reasoning that orders issued in independent proceedings are final and appealable because "[w]hen a district court's order disposes of all of the issues that are before it, the order is usually considered to be final"); *Prudential*, 42 F.3d at 1302 (reasoning that, where a motion to compel arbitration is the only claim before the district court, appellate review of an order compelling arbitration is permissible because such an order is "deemed to dispose of the entire case"); *Stedor Enters.*, 947 F.2d at 731 ("[W]hen a district court compels arbitration in a proceeding in which there are no other issues before the court, that order is final . . . because the court has disposed of the whole case on the merits."). The Second Circuit's reasoning regarding independent proceedings applies with equal force to the present case:

> [A]n arbitrability decision arising from an independent proceeding . . . resolves the sole issue before the court. Consequently, once a court conducting an independent proceeding determines that a dispute is or is not arbitrable, the court generally does not retain jurisdiction over the parties. Because in such circumstances the district court's arbitrability decision *ends the litigation on the merits and leaves nothing for the court to do but execute the judgment*, it is a final decision.

Matter of Chung and President Enters., 943 F.2d 225, 228 (2d Cir. 1991) (emphasis added) (internal quotation and citations omitted).

The district court's order in this case ended the litigation on the merits and left nothing for the court to do. The district court's order is therefore a final, appealable decision.

III. DISMISSAL OF AN ACTION INVOLVING AN EMBEDDED ARBITRABILITY PROCEEDING IS AN APPEALABLE FINAL JUDGMENT

There are two different courses of action that a district court may take when ordering arbitration in an embedded arbitrability proceeding. Most of the time, the district court *stays* the case pending the outcome of arbitration. It is well-settled that an order compelling arbitration in those circumstances is an interlocutory order. *See Prudential*, 42 F.3d at 1302. Occasionally, however, the district court *dismisses* the entire case upon ordering arbitration; this is true of the present case. In these circumstances, I believe that the order compelling arbitration is a final, appealable decision. Logic and the law of two federal circuits support this view.

While the Ninth Circuit has not ruled on the issue whether an order compelling arbitration and dismissing an action is a final decision, the Sixth and Tenth Circuits have held that, where the district court dismisses the action upon ordering arbitration, the order is an appealable final decision. In *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990), the Sixth Circuit held that an order dismissing a complaint in deference to arbitration was a final decision because there was "nothing left for the district court to do but execute the judgment." 920 F.2d at 1276. The court in *Arnold* stated that "a final order is one

which dismisses 'an action in deference to arbitration' and enters a final judgment." *Id.* at 1275 (quoting 134 Cong. Rec. S16284 (daily ed. Oct. 14, 1988)).

In *Armijo v. Prudential Insurance Co. of America*, 72 F.3d 793 (10th Cir. 1995), the Tenth Circuit held that a "district court's order granting [the defendant's] motion to compel arbitration and to dismiss [the] [p]laintiffs' claims was clearly a final order" over which the Court of Appeals had jurisdiction. *Id.* at 797; *see also Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994) (holding that, because appeal was presented to the appellate court upon the district court's order of dismissal, the appellate court had jurisdiction and could correct procedural error where the district court erroneously dismissed the action instead of granting defendant's motion for stay of action pending outcome of arbitration).

The majority, however, chooses to rely on the contrary holdings of the Eighth and Fifth Circuits. In *Gammaro v. Thorp Consumer Discount Co.*, the Eighth Circuit held that a district court's order compelling arbitration and dismissing class allegations was an embedded proceeding and was therefore interlocutory. 15 F.3d 93, 95 (8th Cir. 1994). The court in *Gammaro* acknowledged the "harshness" of the "bright-line" rule it adopted. *Id.* at 96. In *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769 (5th Cir. 1996), the Fifth Circuit held that the test of finality is whether the order arose out of an independent or embedded arbitrability proceeding, regardless of whether the order completely ended the litigation on the merits in the district court. *Id.* at 771.

The majority opinion also cites to cases from several other circuits in support of its assertion that the majority of circuits that have addressed this issue have followed the holding of *Gammaro*. The majority's reliance on these cases is misplaced, however, because the facts of these cases involve *stays* rather than *dismissals* of actions. *See F.C. Schaffer & Assocs., Inc. v. Demech Contractors, Ltd.*, 101 F.3d 40, 41, 43 (5th Cir. 1996) (holding that a denial of a motion for declaratory judgment against arbitration and a stay of court litigation pending the outcome of arbitration is not a final decision); *American Cas. Co. of Reading, Penn. v. L-J, Inc.*, 35 F.3d 133, 139 (4th Cir. 1994) (holding that an order staying litigation pending arbitration of embedded claims is not a final decision); *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 61 (2d Cir. 1993) (holding that an order compelling arbitration that did not dismiss the complaint was not appealable).[1]

The majority opinion and the Eighth and Fifth Circuit authority on which it relies ignore the critical distinction between a stay and a dismissal. Under a *stay*, the district court retains jurisdiction over the action. *Matter of Chung*, 943 F.2d at 228 ("Since a court retains jurisdiction over the parties to an embedded proceeding while they arbitrate a discrete portion of their dispute, it is logical to delay an appeal of a ruling compelling arbitration until the court

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[1] Significantly, in *Filanto*, the Second Circuit held that an order compelling arbitration that failed to expressly dismiss the complaint was not appealable. 984 F.2d at 61. The court in *Filanto* acknowledged that its reasoning supports the inference that a judgment of dismissal by the court would have rendered the order an appealable final decision. *Id.* at 61 n.3.

subsequently confirms or rejects the arbitrator's decision."); *Delta Computer Corp. v. Samsung Semiconductor & Telecomms. Co.*, 879 F.2d 662, 663 (9th Cir. 1989) (noting that the district court stayed the proceedings and retained jurisdiction to monitor the case and enforce any arbitration award). By contrast, after a *dismissal*, the district court does not retain jurisdiction. Fed. R. Civ. P. 41(b); *Matter of Chung*, 943 F.2d at 228 ("[O]nce a court conducting an independent proceeding determines that a dispute is or is not arbitrable, the court generally does not retain jurisdiction over the parties.").

By ignoring the distinction between a stay and a dismissal and treating the dismissal in this case as interlocutory, the majority creates a jurisdictional loophole that unjustifiably precludes immediate appeal in cases where the arbitrability issue is embedded but the action is dismissed rather than stayed. In this case, this loophole disadvantages the senior citizens and benefits Providential. Under the majority's approach, the senior citizens' claims are completely dismissed from the district court unless and until the senior citizens apply for review after the arbitration proceeding has run its course. Moreover, the senior citizens are denied the opportunity for immediate appeal that such a dismissal would ordinarily provide. Providential, however, is shielded from the possibility of immediate appeal of the arbitration order and also enjoys the benefit of an immediate dismissal of the senior citizens' claims from federal court.

Finally, I also note that the majority's new jurisdictional rule effectively deprives the senior citizens of any hope for review of their claims that Providential effectively cheated them out of their home equity. As stated

above, TILA provides for class actions in federal court. 15 U.S.C. § 1640(a)(2)(B). Plaintiffs sought to represent the class of senior citizens who had purchased reverse mortgages from Providential, by bringing federal and state claims in federal court.

Instead, the senior citizens have been denied their day in federal court and have been told to turn to arbitration. Because we have held that the Federal Arbitration Act does not permit consolidation of separate arbitration claims absent express language in the arbitration clause that allows such consolidation, *Weyerhaeuser Co.*, 743 F.2d at 637, the senior citizens will be forced to separately arbitrate each individual claim in a proceeding that may be prohibitively expensive. In support of its motion to compel arbitration, Providential submitted the 1993 Commercial Arbitration Rules of the American Arbitration Association. Based on the rates found within these rules, and assuming a multi-arbitrator panel sitting for five days, average minimum damages of $50,000, and a class-wide total of 1500 members, the senior citizens in the proposed class would have to pay over $3.75 million to even gain access to the arbitral system. (Appellants' Opening Brief at 14). *Each* senior citizen would be forced to pay $2,500 of out-of-pocket expenses to proceed to arbitration. *Id.* at 14 n.10. This represents a tremendous sum for an elderly person who relies on income from a reverse mortgage. Hence the majority's new jurisdictional rule may do more than close the door on federal court proceedings; it effectively sounds a death knell for the entire action.

IV. CONCLUSION

The jurisdictional bar created by the majority gives Providential and its agents a windfall. The company benefits from both the dismissal of the senior citizens' claims from federal court and the protection from appeal that is bestowed by the majority. Moreover, Providential may reap the additional benefit of avoiding arbitration with senior citizens who are too poor to pay initial arbitration fees. Because the majority unfairly deprives the senior citizens of their appeal of right, I dissent.

MARY McCARTHY, et al., Plaintiffs, v. PROVIDENTIAL CORPORATION, et al., Defendants.

No. C 94-0627 FMS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1994 U.S. Dist. LEXIS 10122

July 18, 1994, Decided

July 19, 1994, Filed; July 21, 1994, Entered

JUDGES: SMITH

OPINION BY: FERN M. SMITH

OPINION: ORDER GRANTING MOTION TO COMPEL ARBITRATION

ISSUES

The central issues raised by this motion to compel arbitration are (1) whether the contract between plaintiffs and defendants compels arbitration of plaintiffs' claims; and if so, (2) whether the Court may compel arbitration to proceed on a class basis. For the reasons stated herein, the Court holds that the arbitration clause is enforceable, and that the Court does not have the authority to order arbitration to proceed on a class basis.

BACKGROUND

Defendant Providential Corporation is a Delaware corporation that has been the holding company parent of its wholly-owned subsidiary, defendant Providential Home Income Plan, Inc. ("PHIP"), since June 1989. These

two defendants shall be referred to collectively as "Providential." Defendants William J. Texido and Feroze A. Waheed are co-founders of Providential. Mr. Texido is Providential's Chairman of the Board, President and Chief Executive Officer. Mr. Waheed is Providential's Executive Vice President.

Providential sells reverse mortgage loans for qualifying senior citizen homeowners. These reverse mortgage loans provide senior citizen homeowners monthly, tax-free cash advances to supplement their current income. Repayment of the principal and interest is deferred for as long as the borrower remains in his or her home. In exchange, the homeowner conveys to Providential a deed of trust for equity in the home equal to the amount borrowed plus interest. The deed grants Providential the power of sale should the borrower default on his or her payment when it becomes due.

Plaintiffs Mary McCarthy, Perry and Eunice Williams, and Eda Kavin took out Providential's reverse mortgage loans. Mrs. McCarthy and Ms. Kavin continue to receive monthly payments from Providential pursuant to their reverse mortgage agreements. Mr. and Mrs. Williams decided to pay off their reverse mortgage loan. Plaintiff John de Ridder is the executor of the estate of Harriet Meyers, a deceased borrower of a Providential reverse mortgage loan. Mrs. Meyers received monthly payments until her death in 1992.

On February 23, 1994, plaintiffs filed a class action complaint against Providential alleging violations of the Truth in Lending act, specifically Regulation Z. On April

25, 1994, plaintiffs filed a first amended class action complaint ("complaint") against Providential and two of its officers alleging that defendants systematically and fraudulently schemed to deny senior citizens of the equity in their homes. The complaint contains additional claims of fraud and deceit, negligent misrepresentation, unlawful, unfair or fraudulent business practices and alleged violations of the California Consumers Legal Remedies Act. Plaintiffs seek damages for the injuries suffered from these alleged violations.

Each of the reverse mortgage agreements consisted of a deed of trust, a loan agreement and a note. Defendants issued to plaintiffs other documents including a Truth in Lending Act disclosure statement and promotional materials. The deeds of trust entered into between Providential and each of the plaintiffs contains an arbitration clause. This Court construes Defendants' motion as a petition under 9 U.S.C. §§ 2 and 4 to compel arbitration of plaintiffs' claims and order that arbitration proceed on an individual, rather than a class, basis.

DISCUSSION

I. The Federal Arbitration Act Standard

Section 2 of the Federal Arbitration Act ("FAA") provides that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (West 1994). The Act governs if the underlying contract facilitates interstate commercial transactions or directly or indirectly affects commerce between states. *See*

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401-402 n.7, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967). Claims arising under the Truth in Lending Act presumptively involve interstate commerce; thus, the claims alleged in the amended complaint are within the coverage of the FAA. *Meyers v. Univest Home Loan, Inc.*, No. C-93-1783 MHP, 1993 U.S. Dist. LEXIS 11333, at *8 (N.D. Cal. Aug. 5, 1993) (Patel, J.).

The effect of section 2 is "to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). Whether an arbitration provision, as opposed to the underlying contract, is enforceable, is a question for the court, not the arbitrator. *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1989). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24. In enacting the FAA, Congress "declared a national policy favoring arbitration" intended to reverse centuries of judicial hostility to arbitration agreements. *Southland Corp. v. Keating*, 465 U.S. 1, 10, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984). Accordingly, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24, and the courts must "rigorously enforce agreements to arbitrate," *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).

On the other hand, arbitration is a matter of contract, and a party cannot be required to submit any dispute to arbitration which he has not agreed to submit. *AT&T*

Technologies, Inc. v. Communications Workers, 475 U.S. 643, 648, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986). Before a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect. *Three Valleys Municipal Water District v. E.F. Hutton & Company Inc.*, 925 F.2d 1136, 1141 (9th Cir. 1991).

When considering a motion to compel arbitration, the court applies a standard similar to the summary judgment standard of Fed. R. Civ. P. 56. Only when there is no genuine issue of material fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement. *Id.* If there is doubt as to whether such an agreement exists, the matter should be resolved through an evidentiary hearing or mini-trial. *Id.* When considering a motion to compel arbitration which is opposed on the ground that there is no binding agreement to arbitrate, the district court should give the opposing party the benefit of all reasonable doubts and inferences that may arise. *Id.*

II. Scope of the Arbitration Clause

The threshold question presented in this motion is whether the arbitration clause, by its own terms, applies to the claims brought in plaintiffs' complaint. The Court finds that it does. Each plaintiff entered into a deed of trust with Providential. Each deed of trust contains the following arbitration provision:

> 7.11. Arbitration. Any controversy or claim arising out of or relating to the Loan Documents,

> the breach thereof or the default thereunder, shall be settled by binding arbitration under the jurisdiction of the American Arbitration Association in accordance with its Commercial Arbitration Rules. The arbitration shall be conducted in the city of San Francisco. Judgment upon any award rendered by the arbitrator may be entered in any appropriate court.

Section 2(a) of each deed of trust defines "loan documents" for the purposes of the deed of trust to include the deed of trust, the note, the loan agreement and "all other documents relating to the loan." This arbitration provision was expressly incorporated into each plaintiff's loan agreement in section 6.4, and into each plaintiff's note in Section 5.

The Supreme Court has held that arbitration clauses providing for coverage of claims "arising out of or relating to" contracts are broad and encompass not only claims for breach of contract, but also claims in tort, and other claims relating to the underlying contract. See, e.g., *Prima Paint Corp.*, 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967) (arbitration clause providing coverage for claims "relating to" consulting agreement covers claim for fraudulent inducement into the contract); see also *Mediterranean Enterprises v. Ssangyong*, 708 F.2d 1458 (9th Cir. 1983) (arbitration clauses including the terms "arising out of or relating to" a contract are broader than clauses including only the terms "under" or "arising out of" a contract).

Plaintiffs contend that the claims they raise in their complaint are not covered by the arbitration clause because their claims do not arise out of or relate to "loan

documents" within the meaning of the arbitration clause. Rather, plaintiffs argue, their claims arise from Providential's Truth in Lending disclosure statements, marketing materials, and loan proposals, which do not constitute "loan documents" within the meaning of the clause. Accordingly, plaintiffs conclude that the arbitration clause is inapplicable and that the parties never intended to arbitrate the claims raised in the complaint.

Plaintiffs' argument is without merit. To support their contention that the disclosure statement is not a "loan document" within the meaning of the arbitration clause, plaintiffs rely on the definition of "loan document" that appears in the disclosure statement. The disclosure statement defines "loan document" to include only the deed of trust, the loan agreement itself, and the note. Plaintiffs ignore the definition of "loan document" found in the very document that contains the arbitration clause itself, namely the deed of trust.

The definition of "loan document" for the purposes of the arbitration provision should be construed in accordance with the definition in that same document. In section 2(a) of the deed of trust, "loan documents" is defined to include "this Deed of Trust, the Note, the Loan Agreement and all other documents relating to the Loan." Contrary to plaintiffs' contentions, the Truth and Lending disclosure statement is obviously a document that relates to the loan documents. The statement, required by law, provides information to each borrower regarding the loan, such as the annual percentage rate and the amount financed – terms which are created by the loan documents. The disclosure statement is meaningless without reference to the deed of trust, the loan agreement, and the

note. The statement would not be at issue if it had no relation to the loan agreement.

Moreover, the disclosure statement expressly limits its definition of the term "loan documents" to its use within the disclosure statement itself. "In this Disclosure Statement," the definition reads, "these documents are referred to as the 'Loan Documents' . . . " Thus, by its own terms, the definition of "loan documents" in the disclosure statement is limited to the disclosure, statement itself, and does not purport to define any terms used in the arbitration provision of the deed of trust, loan agreement, or note. This Court rejects plaintiffs' argument that the scope of the arbitration clause should be determined from a different document. The document setting forth the arbitration agreement itself defines the term in question.

The scope of the arbitration clause clearly includes all disputes arising out of or related to any document relating to the loan (with certain enumerated exceptions not pertinent here). All of the claims in plaintiffs' complaint plainly arise out of or relate to Providential's reverse mortgage loan agreements with the plaintiffs. Thus, the arbitration provision applies to all of the claims brought by plaintiffs.

III. Enforcement of the Arbitration Clause

A. Only Federal Law Applies

Plaintiffs raise several state law contract defenses to avoid enforcement of the arbitration provision. Under Ninth Circuit law, however, the validity of a defense to

the enforcement of an arbitration agreement is to be governed exclusively by application of federal standards.[1] *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 285 (9th Cir. 1988); *Bayma v. Smith Barney, Harris Upham & Co., Inc.*, 784 F.2d 1023, 1025 (9th Cir. 1986). "State law adhesion principles may not be invoked to bar arbitrability of disputes under the [Federal] Arbitration Act." *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 934 (quoting *Cohen*, 841 F.2d at 286) (alteration in original).

The FAA creates a body of federal substantive law of arbitrability that preempts contrary state law or policies. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983); *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 285 (9th Cir. 1988); *Bayma v. Smith Barney Harris Upham and Co., Inc.*, 784 F.2d 1023, 1025 (9th Cir. 1986). The Supreme Court has suggested that an arbitration agreement may be unenforceable under general principles of federal law. "Courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer*

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[1] Plaintiffs argue that *Perry v. Thomas*, 482 U.S. 483, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987), suggests, without deciding, that state law principles which specifically govern the enforceability of arbitration agreements are preempted by federal law, but that state law contract principles which apply to contracts in general are not. Ninth Circuit precedent, however, requires that the instant dispute be resolved exclusively under principles of federal law. See, *Meyers v. Univest*, No. C 93-1783, 1993 U.S. Dist. LEXIS 11333, *7 (N.D. Cal. Aug. 5, 1993) (the arbitrability of claims arising under the Truth in Lending Act is determined exclusively by federal law).

v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 1656, 114 L. Ed. 2d 26 (1991) (internal quotations omitted).

B. Defenses To Enforcement of Arbitration Clause

When considering a petition to compel arbitration under 9 U.S.C. § 2, *Prima Paint* requires that courts treat arbitration clauses as severable from the documents in which they are embedded, unless there is clear intent to the contrary. *Prima Paint Corp.*, 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 476 (9th Cir. 1991). The District Court may not consider defenses that challenge the validity or enforceability of the entire contract. *Teledyne, Inc.*, 892 F.2d at 1410; *Three Valleys Municipal Water District*, 925 F.2d at 1139-40. It may only consider defenses which go specifically to the validity of the arbitration provision itself. *Id.*; *Teledyne, Inc.*, 892 F.2d at 1410; *Three Valleys Municipal Water District*, 925 F.2d at 1139-40. The issue before the Court is not the validity of the contract as a whole, but only whether the parties validly contracted to arbitrate disputes arising out of the contract. An arbitration clause may be enforced even though the rest of the contract is later held invalid by the arbitrator. *Prima Paint Corp.*, 388 U.S. at 404; *Republic of Nicaragua*, 937 F.2d at 476; *Teledyne, Inc.*, 892 F.2d at 1410.

1. Duty to Inform Senior Citizens

Plaintiffs claim that the arbitration provision is unenforceable because defendants failed to inform them that

they were waiving important rights by agreeing to arbitrate. Plaintiffs claim that defendants had a "compelling" duty to explain to senior citizens the consequences of the arbitration provision.

The Ninth Circuit has expressly stated that there is no duty under federal law to inform people verbally of the ramifications of a contract clause. In *Cohen*, plaintiff investors argued that defendant stockbroker had a duty to explain to plaintiffs the significance of an arbitration clause. The Ninth Circuit stated:

> We know of no case holding that parties dealing at arm's length have a duty to explain to each other the terms of a written contract. We decline to impose such an obligation where the language of the contract clearly and explicitly provides for arbitration of disputes arising out of the contractual relationship . . . 'The [plaintiffs] cannot use their failure to inquire about the ramification of that clause to avoid the consequences of agreed-to arbitration.'

Cohen, 841 F.2d at 287; *Meyers*, at 10-11.

The reasoning of *Cohen* applies here. The arbitration clause in the deeds of trust executed between each plaintiff and Providential was straightforward and clear:

> "7.11. Arbitration. Any controversy or claim arising out of or relating to the Loan Documents . . . shall be settled by binding arbitration under the jurisdiction of the American Arbitration Association in accordance with its Commercial Arbitration Rules." Contrary to plaintiffs' assertions, it does not take a "clairvoyant" to understand the meaning of clause. Regrettably,

> plaintiffs' assumption of loans without understanding all of the terms of the contract may represent the norm and not the exception. This failure to inquire, however, will not shield them from obligations clearly and explicitly contained in the agreement. *See Cohen*, 841 F.2d at 287 ("We see no unfairness in expecting parties to read contracts before they sign them"); *see also Meyers*, at 11.

Plaintiffs improperly rely exclusively on California state law to illustrate the existence of a duty to disclose. As discussed above, the Ninth Circuit has held that state law is not applicable when considering the validity of defenses to the enforceability of an arbitration clause. *Mago*, 956 F.2d at 934; *Cohen*, 841 F.2d at 287; *Bayma*, 784 F.2d at 1025.

2. Unconscionability

Plaintiffs claim that the arbitration provision should not be enforced because it is unconscionable. Plaintiffs describe a number of allegedly unconscionable material terms in the contracts as a whole, such as very high interest rates and fraudulent calculations of the estimated life expectancy of the borrowers. As discussed above, however, in determining arbitrability the Court may only consider whether the arbitration provision itself is unconscionable. *Prima Paint Corp.*, 388 U.S. at 404; *see also Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850, 854 (11th Cir. 1986) (allegations of unconscionability in the contract as a whole are matters to be resolved in arbitration); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 398 (5th Cir. 1981) (same).

Although definitions of unconscionability vary according to circumstances, several federal courts adopt the definition offered by the United States Court of Appeals for the District of Columbia in *Williams v. Walker-Thomas Furniture Co.*, 121 U.S. App. D.C. 315, 350 F.2d 445 (D.C. Cir. 1965). *Brick v. J.C. Bradford & Company, Inc.*, 677 F. Supp. 1251, 1254, n.5 (D.C. Cir. 1987); *see Meyers* at 9-10. In *Williams*, the court explained that unconscionability includes "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' *Williams*, 350 F.2d at 449." This test contains both a procedural and a substantive component, both of which must be satisfied for an agreement to be unconscionable. *Meyers*, 1993 U.S. Dist. LEXIS 11333, at *8.

Plaintiffs satisfy neither the procedural nor the substantive element of this test with respect to the arbitration clause itself. Procedural unconscionability is demonstrated by showing (1) a lack of understanding of the contract terms arising from inconspicuous print or the use of complex, legalistic language, (2) gross disparity in sophistication of parties, and (3) lack of opportunity to study the contract and inquire about its terms. *Bank of Indiana, Nat. Ass'n v. Holyfield*, 476 F. Supp. 104 (S.D. Miss. 1979).

Plaintiffs claim that the arbitration provision is not susceptible of ready understanding and interpretation. This argument is without merit. As discussed above, the Court finds the provision is clear and unambiguous. Plaintiffs also claim that there was inequality of bargaining power between the parties – that the borrowers were financially distressed, elderly and "unsophisticated"

folks with little knowledge about reverse mortgages. While this may very well be true, inequality of bargaining power is not alone a sufficient basis upon which to show procedural unconscionability. Plaintiffs next object that the arbitration provision was never explained to the parties. As discussed above, however, federal law imposes no duty upon defendants to explain it. Plaintiffs do not allege that they had no opportunity to inquire about the meaning of the arbitration clause.

Substantive unconscionability arises when the formal contract terms have an "oppressive character." *Bank of Indiana*, 476 F. Supp. at 110. Applying the substantive component of the unconscionability test, federal courts have held that arbitration clauses do not, per se "unreasonably favor one party over the other." *Brick*, 677 F. Supp. at 1253 n.5 (citing *Shotto v. Laub*, 632 F. Supp. 516, 522 & n.9 (D. Md. 1986)); *Driscoll v. Smith Barney, Harris, Upham & Co.*, 815 F.2d 655, 658-59 (11th Cir. 1987); *see also Meyers*, 1993 U.S. Dist. LEXIS 11333, at *13-14. Plaintiffs have made no allegation that the arbitration clause at issue here unreasonably favors defendants, or that plaintiffs will be denied a full and fair consideration of their claims in arbitration under the American Arbitration Association.

3. Fraud In the Inducement

Plaintiffs also claim that the arbitration provision is unenforceable because defendants' fraud permeates all

material provisions of the contract, including the arbitration provision. Plaintiff cites no federal case which recognizes such a defense to an arbitration clause; and, state law is inapplicable. *Cohen*, 841 F.2d at 285.

In *Prima Paint*, the Supreme Court made it clear that Section 4 of the FAA "does not permit the district court to consider claims of fraud in the inducement of the contract generally." *Prima Paint Corp.*, 388 U.S. at 403-04. The district court may only adjudicate a claim of fraud that "goes to the 'making' of the agreement to arbitrate." *Id.* at 403-04; *Sparling v. Hoffman Construction Co., Inc.*, 864 F.2d 635, 638 (9th Cir. 1988); *Republic of Nicaragua*, 937 F.2d at 476-477, *cert. denied*, 112 S. Ct. 1294 (1992).

Fraud in the inducement of an agreement arises when a defendant is persuaded through fraudulent representations to enter into an agreement that he would not otherwise have entered into. *Southwest Administrators v. Rozay's Transfer*, 791 F.2d 769, 774 (1986). While plaintiffs' fifty-six page first amended complaint includes a general claim of fraud arising out of the contract generally, it does not allege fraud specifically with respect to the arbitration agreement itself. Nor do plaintiffs now allege that defendants made any misrepresentations with regard to the arbitration clause, or that they were induced by any misrepresentation to accept the arbitration provision. "In order for a mere omission to constitute actionable fraud, a plaintiff must first demonstrate that the defendant had a duty to disclose the fact at issue." *Cohen*, 841 F.2d at 287. Here, defendant had no such duty. *Id.*; *Meyers*, at 10-11.

The only argument that plaintiffs make regarding fraud in the arbitration clause itself is that the arbitration

provision is "merely a ruse used to effect defendants' well-planned and executed scheme." Plaintiffs maintain that, should the Court compel arbitration, "all but the four named plaintiffs will be denied a remedy." This claim is simply without foundation. Any borrower with a claim that his contract is unconscionable or fraudulent may bring his or her claim in the arbitral forum in accordance with the agreement of the parties.

In sum, even if all of plaintiffs' allegations were true, the arbitration provision is enforceable. Under federal law, defendants had no duty to inform plaintiffs of the significance of the arbitration provision; the agreement to arbitrate is not unconscionable; and defendants did not fraudulently induce plaintiffs into accepting the provision.

IV. Individual Versus Class Arbitration

The issue remains whether the Court may direct the arbitrator to adjudicate this dispute as a class action. Defendants argue that the Court is not authorized to order a class arbitration because the arbitration clause is silent as to class action. Plaintiffs, by contrast, argue that class treatment is appropriate and that the Court is authorized to compel class arbitration.

No federal appellate court opinion directly addresses the issue of whether district courts have authority under the FAA to order a suit to proceed to arbitration as a class action where the arbitration agreement is silent on the

issue.[2] In an analogous context, however, the Ninth Circuit, and most other circuits that have considered the issue, have held that a district court is without power to consolidate arbitration proceedings absent an authorizing provision in an arbitration agreement. *See Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 636-37 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061, 83 L. Ed. 2d 431, 105 S. Ct. 544 (1984); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1194-95 (8th Cir. 1990); *Del E. Webb Construction v. Richardson Hospital Authority*, 823 F.2d 145, 149-50 (5th Cir. 1987). These cases rely on the language of the FAA which provides that, where the prerequisites are satisfied, "the court shall . . . direct the parties to proceed to arbitration in accordance with the terms of the agreement." *9 U.S.C. § 4*. They reason that, where an arbitration agreement did not specifically provide for consolidation of separate arbitrations, the parties did not agree that plaintiffs could consolidate their arbitrable claims. *Weyerhaeuser Co.*, 743 F.2d at 636-37.

The same rationale leads to the conclusion that the court cannot compel arbitration on a class basis where the agreement did not specifically provide for it. Consolidation and class actions are both methods of adjudicating numerous individual actions involving common questions of law or fact. In a case similar to the one presented here, involving a putative class action against lenders under the federal Truth in Lending Act, a Minnesota district court used this same reasoning to decide that the

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[2] The circuit courts are split, however, on the issue of whether a district court has the authority to consolidate related claims for arbitration proceedings.

court did not have the authority to compel arbitration on a class-wide basis if the arbitration clause did not so provide. *Gammaro v. Thorp Consumer Discount Company*, 828 F. Supp. 673, 674 (D. Minn. 1993). Thus, the only issue remaining before this Court is whether the parties entered into a written agreement providing for arbitration on a class-wide basis. There is no provision in any of the arbitration agreements providing for consolidation with the claims of others. Accordingly, the Court finds that it is without power to order this matter to proceed to arbitration as a class action.

The Ninth Circuit explained that "an agreement to arbitrate before a special tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Weyerhaeuser Co.*, 743 F.2d at 637, (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974)). Here, the parties agreed to arbitrate "under the jurisdiction of the American Arbitration Association in accordance with its Commercial Arbitration Rules." The Commercial Arbitration Rules of the American Arbitration Association may provide for class treatment of plaintiffs claims; but, that question is for the arbitrator to consider, not the court. If the rules of the American Arbitration Association do not permit class treatment, "any lack of congruence which may exist between the remedial powers of a court and those of an arbitrator is hardly fatal to arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 199 n.8 (4th Cir. 1990), *aff'd*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991).

Normally, under 9 U.S.C. § 3, a court would stay proceedings pending the conclusion of the arbitration. *Margalioth v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 695 F. Supp. 756, 757 (S.D.N.Y. 1988). However, in the present case, none of plaintiff's claims remain to be resolved by this court, and therefore there is no reason to stay these proceedings pending the arbitrator's decision.

CONCLUSION

For the foregoing reasons, the Court finds that the plaintiffs' objections to enforcement of the arbitration clause are without merit. The arbitration clause covers the claims brought in plaintiffs' complaint, and is not unconscionable or fraudulent. It is thus enforceable.

Accordingly, the Court ORDERS that the parties submit their claims to arbitration as required by their agreement. Further, the Court holds that it is without authority to order that arbitration proceed as a class action. This action is DISMISSED. The hearing date of July 29, 1994 is hereby VACATED. The motion for class certification is DISMISSED as moot, and no further briefing thereon shall be entertained.

SO ORDERED.

DATED: July 18, 1994

FERN M. SMITH
United States District Judge

JUDGMENT

This action is dismissed for the reasons set forth in the accompanying order. The Clerk of the Court shall close the file.

SO ORDERED.

DATED: July 18, 1994

FERN M. SMITH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARY McCARTHY, et al., Plaintiff (s), vs. PROVIDENTIAL CORPORATION, et al., Defendant (s).	No. C 94-0627 FMS JUDGMENT (Filed Jul. 19, 1994)

This action is dismissed for the reasons set forth in the accompanying order. The Clerk of the Court shall close the file.

SO ORDERED.

DATED: July 18, 1994

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY McCARTHY; PERRY WILLIAMS; EUNICE WILLIAMS, Plaintiffs-Appellants, vs. PROVIDENTIAL CORPORATION; PROVIDENTIAL HOME INCOME PLAN, INC.; WILLIAM J. TEXIDO; FEROZE A. WAHEED, Defendants-Appellees.	No. 94-16384 D.C. No. CV-94-00627-FMS ORDER (Filed Feb. 25, 1998)

Before: PREGERSON, BRUNETTI, and T.G. NELSON, Circuit Judges.

Judge Brunetti and Judge T.G. Nelson have voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc. Judge Pregerson has voted to grant appellants' petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY McCARTHY;
PERRY WILLIAMS;
EUNICE WILLIAMS,

Plaintiffs-Appellants,

vs.

PROVIDENTIAL CORPORATION;
PROVIDENTIAL HOME INCOME PLAN, INC.;
WILLIAM J. TEXIDO;
FEROZE A. WAHEED,

Defendants-Appellees.

No. 94-16384

D.C. No. CV-94-00627-FMS

ORDER

(Filed Apr. 11, 1997)

Before: PREGERSON, BRUNETTI, and T.G. NELSON, Circuit Judges.

The parties are directed to submit simultaneous supplemental letter briefs, not to exceed ten (10) pages, addressing whether or not the district court's order in this case is an interlocutory order and whether this appeal is prohibited by 9 U.S.C. § 16(b)(2). The parties should also discuss the holding in *Gammaro v. Thorp Consumer Discount Co*, 15 F.3d 93 (8th Cir. 1994), as it relates to our jurisdiction to hear this appeal.

The parties' briefs shall be filed on or before fourteen (14) days from the date of this order.

Supreme Court, U.S.
FILED
JUN 25 1998
OFFICE OF THE CLERK

No. 97-1895

In The

Supreme Court of the United States

October Term, 1997

MARY McCARTHY, et al.,

Petitioners,

vs.

PROVIDENTIAL CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit correctly hold that where a district court grants a defendant's motion to compel arbitration of all claims in an action and then *sua sponte* dismisses the action, the appeal should be dismissed for lack of jurisdiction under 9 U.S.C. § 16, without prejudice to a later, timely appeal after arbitration has run its course?

ALL PARTIES AND RULE 29.6 DISCLOSURE

Respondents were defendants-appellees before the Ninth Circuit Court of Appeals and consist of the following: Providential Corporation, Providential Home Income Plan, Inc., William J. Texido[1] and Feroze A. Waheed. Petitioners were plaintiffs-appellants before the Ninth Circuit Court of Appeals and consist of the following: Mary McCarthy, Perry and Eunice Williams, John de Ridder and Eda Kavin.

After the filing of this action, respondents Providential Corporation and Providential Home Income Plan, Inc. were acquired and later merged into Wilmington Savings Fund Society (FSB). Wilmington Savings Fund Society (FSB) has no subsidiaries that are not wholly owned. The parent company of Wilmington Savings Fund Society (FSB) is WSFS Financial Corporation.

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[1] Mr. Texido passed away in August, 1994.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Providential Corporation, Providential Home Income Plan, Inc., William J. Texido and Feroze Waheed respectfully oppose the petition of Mary McCarthy, et al., for a writ of certiorari.

OPINIONS BELOW

Petitioners correctly stated the opinions below.

STATUTORY PROVISIONS INVOLVED

Petitioners correctly stated the statutory provisions involved.

STATEMENT OF THE CASE

I. PROCEEDINGS IN THE DISTRICT COURT

Defendants Providential Corporation and Providential Home Income Plan, Inc. were Delaware corporations that originated, funded, serviced and sold reverse mortgage loans for qualifying senior citizen homeowners. Defendants Feroze A. Waheed and William J. Texido were co-founders of Providential and served at different times as Chief Executive Officer of Providential. A reverse mortgage loan allows a senior citizen homeowner to receive monthly, tax-free advances to supplement his or her current income, while repayment of the principal and

interest is deferred for as long as the borrower remains in his or her home. Pet. App. 22a.[2]

Plaintiffs Mary McCarthy, Perry and Eunice Williams and Eda Kavin are borrowers of Providential's reverse mortgage loans. *Id.* Plaintiff John de Ridder is the executor of the estate of Harriet Myers, a deceased borrower of a Providential reverse mortgage loan. *Id.* Each of the reverse mortgage agreements entered into by petitioners with Providential contained a broad and unremarkable arbitration agreement:

> 7.11. Arbitration. Any controversy or claim arising out of or relating to the Loan Documents, the breach thereof or the default thereunder, shall be settled by binding arbitration under the jurisdiction of the American Arbitration Association in accordance with its Commercial Arbitration Rules. The arbitration shall be conducted in the city of San Francisco. Judgment upon any award rendered by the arbitrator may be entered in any appropriate court.

Pet. App. 25a-26a. Thus, the arbitration agreement required that all disputes "arising out of or relating to" the loan transaction (with certain enumerated exceptions) would be resolved through binding arbitration by the American Arbitration Association.

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[2] Petitioners' petition for a writ of certiorari in this Court is referenced herein as "Pet. ___." The appendix included with the petition is referenced herein as "Pet. App. ___."

On February 23, 1994, plaintiffs filed a putative class action complaint against defendants alleging, *inter alia*, violations of the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* and Regulation Z promulgated thereunder.

On May 13, 1994, defendants filed a notice of a petition to compel arbitration. Following briefing, on July 19, 1994, the district court held in a 22-page opinion that the arbitration agreements were valid and enforceable and granted defendants' motion. Pet. App. 21a-40a. The district court further held that it lacked authority to order a class-wide or consolidated arbitration. *Id.* at 39a.

Defendants did not request that the action be dismissed. Nevertheless, the district court held that, although a stay of proceedings pending arbitration is usually ordered, there was "no reason to stay these proceedings pending the arbitrator's decision." *Id.* The district court further held that it "ORDERS that the parties submit their claims to arbitration as required by their agreement" and dismissed the action. *Id.* At the same time, the district court entered a judgment that stated:

> This action is dismissed for the reasons set forth in the accompanying order. The Clerk of the Court shall close the file.

Pet. App. 41a.

II. PROCEEDINGS IN THE COURT OF APPEALS

The Ninth Circuit, in an opinion authored by Circuit Judge Brunetti and joined by Circuit Judge T.G. Nelson, dismissed plaintiffs' appeal for lack of jurisdiction, without prejudice to a later, timely appeal, after arbitration had run its course. Pet. App. 8a-9a. The court followed the analysis of the majority of courts examining the issue of interlocutory appeals under 9 U.S.C. § 16. It held that orders granting motions to compel arbitration in "independent" actions, *i.e.*, those in which arbitrability was the sole issue presented, could be directly appealed. On the other hand, orders granting motions to compel arbitration in "embedded" actions, *i.e.*, those in which arbitrability arose in a substantive suit pending before the district court, may not be directly appealed. Pet. App. 4a-5a.

In particular, the Ninth Circuit followed the Eighth Circuit's decision in *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994), and held that orders granting motions to compel arbitration and dismissing the action in an "embedded" proceeding are not "final decisions" that may be directly appealed under 9 U.S.C. § 16(a)(3). Pet. App. 5a-6a. The court held that appellate review is not conditioned on whether or not the district court dismissed, rather than stayed, the underlying action pending completion of arbitration. It noted that Congress did not "intend[ ] [such an] arbitrary result when it barred appellate review of interlocutory orders compelling arbitration." *Id.* at 8a. The court noted that its interpretation of Section 16 is consistent with Congress' "clear desire to promote greater use of arbitration." *Id.*

Finally, the court took great pains to reiterate that dismissal of the appeal did not preclude review of the district court's order compelling arbitration. Instead, appellate review would be postponed until after the conclusion of the arbitration proceeding. *Id.* at 2a, 7a-8a, 8a-9a.

REASONS FOR DENYING THE PETITION

The Ninth Circuit correctly determined that the granting of a motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, in an action in which the parties seek relief other than an order concerning arbitrability, may not be directly appealed under 9 U.S.C. § 16. The Ninth Circuit properly held that 9 U.S.C. § 16 directs that the decision granting the motion to compel arbitration may be reviewed by an appellate court after the arbitration has run its course. By so ruling, the Ninth Circuit joined the clear majority rule in determining that Section 16 reflected Congress' intent to proceed directly to arbitration without intervening appellate proceedings, and without the presentation of piecemeal appeals.

There is a difference of opinion on this issue among the Circuits. However, this intercircuit conflict largely has been resolved with six Circuit Courts of Appeals agreeing with the rule applied by the Ninth Circuit in this action. In addition, the issue presented in the petition is singularly unimportant – it does not deprive petitioners of the right to appeal the district court's order, it simply compels petitioners to wait until arbitration has run its course

to lodge such an appeal. Finally, even if the Ninth Circuit's decision is incorrect, it will have no impact, as a practical matter, on federal court litigation. Parties simply will ensure that district courts stay, rather than dismiss, actions raising issues other than arbitrability. In that event, it is plain that no appeal lies under 9 U.S.C. § 16(b)(1). As a result, the issue presented by the petition does not warrant review by this Court.

ARGUMENT

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO INTERCIRCUIT CONFLICT ON AN IMPORTANT MATTER THAT WILL AFFECT A SIGNIFICANT NUMBER OF CASES

I. The Ninth Circuit Correctly Followed the Majority of the Circuit Courts of Appeals in Dismissing the Appeal without Prejudice to a Later Timely Appeal.

A. Section 16 Governs Appellate Review of Orders under the Federal Arbitration Act.

Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, in 1925 and "declared a national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Consistent with that Congressional purpose, this Court repeatedly has held that arbitration agreements create a strong presumption in favor of arbitration. *See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The FAA initially did not contain a provision concerning appellate jurisdiction. As a result, the Courts of Appeals developed different standards for appellate

review of arbitration orders that often turned on the distinction between law and equity under the *Enelow-Ettelson* doctrine.[3] Because the existing general statutes concerning appeals, 28 U.S.C. §§ 1291-2, had resulted in a state of confusion among the Circuit Courts of Appeals, Congress enacted a new provision of the FAA concerning appeals in the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1019, 102 Stat. 4642, 4670-71 (1988). In so doing, Congress clearly intended to "promote appeals from orders barring arbitration and limit appeals from orders directing arbitration." *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994). A Practice Commentary acknowledges that Section 16 "is a pro-arbitration statute designed to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration." David D. Siegel, Practice Commentary, 9 U.S.C.A. § 16, at 376 (West Supp. 1998).

As the text of Section 16 indicates, Sections 16(b)(1) and (2) prohibit appeals from interlocutory orders staying an action pending arbitration pursuant to FAA Section 3 and from orders compelling arbitration to proceed under FAA Section 4. Section 16(a)(3) permits an appeal to be taken from "a final decision with respect to an arbitration." Thus, Section 16 forecloses appellate review of a

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[3] *See Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935); *see generally* 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 202.11[7] at 202-59 (3d ed. 1998) (discussing *Enelow-Ettelson* doctrine); Richard Medalie, *The New Appeals Amendment: A Step Forward for Arbitration*, THE ARBITRATION JOURNAL, Vol. 44, No. 2 at 24-5 (June 1989) (same).

district court's decision granting a motion to compel arbitration unless the district court's order can be characterized as "a final decision with respect to an arbitration" pursuant to Section 16(a)(3) or falls within the specific exceptions found in Sections 16(a)(1) and (2).[4]

B. The Ninth Circuit followed the Majority of the Circuits in holding that Orders Compelling Arbitration in "Embedded" Proceedings are Interlocutory Orders that May Not be Directly Appealed.

The clear majority of the Courts of Appeals, including the Ninth Circuit, have distinguished between "independent" and "embedded" proceedings in determining

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[4] Petitioners point to a section by section analysis concerning Section 16 placed in the Congressional Record by Senator Heflin to support their view that a direct appeal may be taken from the dismissal of an "embedded" action in which arbitration is ordered. Pet. 13. This Record insert, not found in any committee report, should be given little weight. Even if the analysis inserted by Senator Heflin is considered, it does not address whether or not direct appeals are to be permitted from orders compelling arbitration in an "embedded" proceeding and dismissing the action. Instead, it simply discusses traditional notions of finality by stating that Section 16 appeals are permitted to "preserve the general policy that appeal should be available when there is nothing left to be done in the district court." Pet. 13 (quoting 134 Cong. Rec. S16284-01 (1988)). *See Catlin v. United States*, 324 U.S. 229, 233 (1945) (appeals generally permitted only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"). As discussed *infra* at 13-14, there *is* something left to be done in the district court: confirmation or consideration of any motions to vacate the arbitral award after the conclusion of arbitration. *See* 9 U.S.C. § 10.

whether or not a district court's order granting a motion to compel arbitration is "a final decision with respect to an arbitration" within the meaning of Section 16(a)(3). "Independent" proceedings are lawsuits in which the sole claim presented to the court is the arbitrability of the dispute. "Embedded" proceedings are actions in which a party seeks some relief other than an order requiring or prohibiting arbitration. *See, e.g., Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.* ___ F.3d ___, 1998 WL 230055, at *2 (1st Cir. May 13, 1998); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212-14 (7th Cir. 1998).

The Ninth Circuit's decision accords with decisions of the First, Second, Fourth, Fifth, Seventh and Eighth Circuits holding that a district court's decision granting a motion to compel arbitration in an "independent" proceeding is "a final decision with respect to an arbitration" that may be reviewed by a direct appeal. These courts have further held that a district court's decision granting a motion to compel arbitration in an "embedded" proceeding – as here – is *not* "a final decision with respect to an arbitration" under Section 16(a)(3) and a direct appeal may not be taken from such an order.[5]

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[5] *See Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 1998 WL 230055, at *2 (1st Cir. May 13, 1998) (order dismissing action and ordering arbitration in "embedded" proceeding is not directly appealable); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212-14 (7th Cir. 1998) (same); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997) (order compelling arbitration is not "a final decision" under Section 16(a)(3) because arbitration issue was embedded in an action asserting other claims); *Ermenegildo Zegna Corp. v. Lanificio Mario Zegna, S.p.A.*, 133 F.3d 177, 181 (2d Cir. 1998) (" . . . in an embedded proceeding, the party that has unsuccessfully opposed arbitration must await

The clear majority of the Courts of Appeals thus agree that the distinction between arbitration orders in "independent" and "embedded" proceedings determines whether or not an order compelling arbitration may be directly appealed, or must await the conclusion of arbitration to be reviewed by the appellate courts. There are only two aberrational decisions by the Courts of Appeals. In *Arnold v. Arnold Corp. – Printed Communications For Bus.*, 920 F.2d 1269, 1276 (6th Cir. 1990), the Sixth Circuit held that when the action has been dismissed as a result of the granting of a motion to compel arbitration, a party may directly appeal the order granting the motion because there has been a "final decision." The *Arnold* court premised its decision upon its holding that the distinction between an "independent" and an "embedded" proceeding had been "reject[ed]" by Congress in enacting Section 16. *Id.* at 1276. This view has not been adopted by any other Court of Appeals. The *Arnold* court's decision has been criticized as erroneous by six Courts of Appeals, including the Ninth Circuit in this case. *See* Pet. App. 7a; *Seacoast Motors*, 1998 WL 230055, at *2; *Napleton*, 138 F.3d at 1212; *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771-72 (5th Cir. 1996); *Adair Bus*

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the conclusion of the arbitration before airing its arguments in opposition to arbitration before an appellate court"); *F.C. Schaffer & Assocs., Inc. v. Demech Contractors, Ltd.*, 101 F.3d 40, 42-43 (5th Cir. 1996) ("Once the district court has made the decision in an 'embedded' proceeding that the parties' dispute is arbitrable, this court lacks jurisdiction to review the district court's decision regarding the arbitrability of the parties' dispute. . . . "); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (appellate courts do not have jurisdiction to hear appeals from arbitration orders in dismissed embedded proceedings).

Sales, Inc. v. Blue Bird Corp., 25 F.3d 953, 955 (10th Cir. 1994); *Gammaro*, 15 F.3d at 95.

In addition to *Arnold*, petitioners rely on another aberrational case, *Armijo v. Prudential Insurance Co. of America*, 72 F.3d 793, 797 (10th Cir. 1995). The Tenth Circuit held that when an action is dismissed upon the granting of a motion to compel arbitration, the appellate court may review the district court's order as a "final order." The *Armijo* court simplistically held that because defendants sought a dismissal, rather than a stay, and the court in fact entered a dismissal, it had appellate jurisdiction.[6] The *Armijo* court further held that if defendants had sought a stay but the court nevertheless dismissed the action (as in the case *sub judice*), the case should be remanded to the trial court for entry of a stay, as in *Adair*, 25 F.3d at 955. *Armijo*, 72 F.3d at 797. Thus, under *Armijo*, appellate jurisdiction is dependent not upon whether the action was dismissed or stayed, but on what specific relief the moving party requested in its motion to compel arbitration. As Professor Miller critically stated in his treatise, "The upshot of this ruling is that a defendant's strategic choices may control the availability of appeal." 15B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.17 at 12 (1998 Supp.). The *Armijo* decision has not been followed by any other Court of Appeals.

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[6] The *Armijo* court strangely relied upon *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994), which expressly *refused* to follow the *Arnold* court's reasoning with respect to Section 16. *Armijo*, 72 F.3d at 796-97.

The majority of the Courts of Appeals to have considered this issue have rejected the mutually inconsistent *Arnold* and *Armijo* decisions. As a consequence, although there is concededly some intercircuit conflict on this issue, it has largely been resolved with most of the Circuits following the majority view embraced by the Ninth Circuit in this case. Under such circumstances, the petition for a writ of certiorari should be denied.

C. Section 16(a)(3) is Consistent with the Final Judgment Rule in Section 28 U.S.C. § 1291.

Petitioners claim that the Ninth Circuit's construction of Section 16 "operates as a partial repeal" of 28 U.S.C. § 1291 and that this Court must grant the petition for certiorari to resolve the conflict between Section 16 and the final judgment rule. Pet. 15, 19. Petitioners' contentions are flawed.

As an initial matter, Congress has the power to enact statutes that determine the scope of appellate jurisdiction. As discussed *supra* at 6-8, in passing Section 16, Congress responded to confusion among the Circuits with respect to the standards for appellate review of arbitration orders under the FAA. This Court also acknowledged the state of confusion and the application of archaic standards to determine appellate jurisdiction prior to passage of Section 16. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 282-88 (1988). Much of this confusion resulted from the absence of any uniform rules concerning the appealability of such orders; instead the courts were guided only by the general appellate standards contained in 28 U.S.C. §§ 1291, 1292. As a result, Congress

passed Section 16 to establish clear guidelines for the appealability of arbitration orders under the FAA. Hence, Congress intended Section 16 to provide new standards for appeals from arbitration orders under the FAA to supplant the old standards that had caused confusion and inconsistency.

In any event, Section 16 is consistent with the final judgment rule expressed in 28 U.S.C. § 1291. Section 1291 expresses the general rule that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Digital Equipment Corp.*, 511 U.S. at 868 (citations omitted)). This Court long has stated that a district court's decision generally is appealable under this section only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945); *see also Quackenbush*, 517 U.S. at 712 (quoting this standard).

The final judgment rule reflects Congress' policy against "piecemeal appellate review of trial court decisions." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)). The decision below is entirely consistent with the rule.

The order at issue in this action does not "end[ ] the litigation on the merits and leave[ ] nothing for the court to do but execute the judgment." *Catlin*, 324 U.S. at 233. There is something left to be done in the district court,

irrespective of whether the action was stayed or dismissed: confirmation or consideration of any motions to vacate the arbitral award after the conclusion of arbitration. *See* 9 U.S.C. § 10. Indeed, parties commonly proceed to arbitration and then challenge the decision compelling arbitration by filing an appeal from the arbitration award. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 941 (1995) (reviewing determination as to whether or not dispute was arbitrable on motion to vacate the arbitral award under 9 U.S.C. § 10). Here, the district court's order represents a ruling on a procedural matter – the merits are left unresolved for the arbitrator to adjudicate. If petitioners were permitted to appeal the district court's determination that their claims must be arbitrated at this stage, petitioners would enjoy two bites at the same appellate apple: once after the district court's ruling on the order compelling arbitration and then another after an arbitration award or a judgment on the merits is entered. This is the piecemeal appeal process that Section 16 was enacted to avoid.

Professor Miller, in his Treatise, correctly noted that the proper course is to interpret Section 1291's finality requirement, as did the court below, flexibly to fulfill the pro-arbitration goals of Section 16:

> Most of the common questions are answered by § 16 in ways that clearly seek to foster arbitration even though at times there may be some sacrifice of the final judgment appeal doctrine. Section 1291 finality doctrine ordinarily should be adapted to reflect the same rules, so as to avoid the confusion and occasional forfeitures that would result from two different bodies of appealability doctrine.

15B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.17 at 37-38 (2d ed. 1992). By recognizing that the granting of an arbitration motion in an "embedded" action is not truly "final" with respect to the controversy before it, the Ninth Circuit correctly harmonized the goals of both Section 16 and Section 1291.

II. The Issue Raised in the Petition Is Unimportant and Will Not Affect a Significant Number of Cases.

The petition for a writ of certiorari does not present an important issue warranting consideration by this Court as required by Supreme Court Rule 10. As an initial matter, the Ninth Circuit did not deny petitioners the right to appeal the district court's determination; instead, it noted that the appeal could only be heard at a later juncture, after the arbitrator reached a decision on the merits. Because the Ninth Circuit has not deprived the petitioners of the right to seek appellate review, but has only specified the point at which review is proper, petitioners, and parties in their position, do not suffer any prejudice. The issue raised is thus merely one of timing, without any substantive rights affected by the rule of decision.

The academic nature of the petition is further reflected in the sparseness of adjudications of this issue. By its nature, the question raised here never arises in the district court; moreover, even ten years after enactment of Section 16, not all Circuit Courts of Appeals have parsed the issue even once. And, as noted, of the courts that

have addressed the appealability issue, all but the mutually inconsistent *Arnold* and *Armijo* courts have agreed with the Ninth Circuit. There is little need to burden this Court's discretionary docket with this issue.

Finally, even if the majority of the Circuit Courts of Appeals, including the Ninth Circuit, are incorrect in determining that a direct appeal may not be taken from an order compelling arbitration in an "embedded" proceeding and dismissing the action, such a determination would have no impact on the handful of cases where this issue might arise. If this Court determined that the Ninth Circuit decision was wrong, as a practical matter, parties moving for arbitration would simply be more vigilant in seeking a stay, rather than a dismissal of an action, following a favorable ruling on a motion to compel arbitration. Section 16 explicitly provides that an appeal of an arbitration order in a stayed action may not be taken prior to the conclusion of arbitration. 9 U.S.C. § 16(b)(1). The advocacy of a stay by a party would hardly be manipulative or improper because Section 16 was specifically enacted to allow arbitration to proceed without intervening appeal. Thus, the issue raised by the petition is unimportant because its resolution by this Court would have no meaningful impact on federal court litigation.

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 97-1895

In The

Supreme Court of the United States

October Term, 1997

MARY McCARTHY, et al.,

Petitioners,

vs.

PROVIDENTIAL CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's final judgment of dismissal is an appealable order under 28 U.S.C. §1291 when the basis for dismissal is that the claims must be arbitrated?

2. Whether the Federal Arbitration Act effects a partial repeal of 28 U.S.C. §1291 by prohibiting appeal of certain final judgments of district courts when they are based upon the holding that the plaintiffs' claims must be arbitrated?

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I. INTRODUCTION

None of Respondents' reasons for denying the Petition for Certiorari withstands scrutiny. While Respondents *concede* that there is a split among the circuits regarding the Questions Presented, they then devote the bulk of their Opposition to arguing the *merits* of the issue. There plainly are two sides to that issue, as illustrated by the circuit split itself, but there is no debating the split's existence.

Beyond arguing the merits, Respondents' strained assertion that resolution of the circuit split is unimportant will not wash. Litigants are entitled to and expect clear and consistent rules of appealability. Given the circuit split, only this Court can provide the certainty that litigants and the courts are entitled to. Ambiguity about appealability may lead to premature or, worse yet, forfeited appeals.

II. ARGUMENT

A. Respondents' Opposition Concedes The Circuit Split

In a breath of refreshing candor, Respondents' Opposition admits there exist grounds for this Court to grant the Petition for Writ of Certiorari: "There is a difference of opinion on this issue among the Circuits." Opp. 5; *see also* Opp. 12 ("there is concededly some intercircuit conflict on this issue").[1]

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[1] Respondents' Opposition to Petitioners' Petition for a Writ of Certiorari is referenced herein as "Opp. ___." The

Having conceded the split, Respondents then attempt to claim "majority" status for their view by citing to several decisions that ostensibly support the *per se* nonappealability of final judgments ordering arbitrations. *See* Opp. 9-10. The problem is, while Respondents' cases deny review, that is the point at which any semblance of a "majority" ends. Three of Respondents' circuits find nonappealability because the judge specifically *retained control* over the action while sending the parties to arbitration.[2] Only the remaining four reject the significance of a *final dismissal* on the appealability of an arbitration order – the issue before this Court – instead, finding dispositive an artificial "embedded/independent" distinction.[3] In contrast, each of Petitioners' three circuits utilizes a narrow analysis concentrating on the *finality* of the decision below.[4]

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original petition is referenced as "Pet. ___," and its Appendix as "Pet. App. ___."

[2] *See Napleton v. General Motors Corp.*, 138 F.3d 1209, 1214 (7th Cir. 1998) (district court had dismissed case *without prejudice*); *Seacoast Motors v. Chrysler Corp.*, No. 97-1694, 1998 U.S. App. LEXIS 9699, at *6 (1st Cir. May 13, 1998) ("embedded" versus "independent" distinction not dispositive; dismissal of action *without prejudice* is); *Ermenegildo Zegna Corp. v. Lanificio Mario Zegna, S.p.A.*, 133 F.3d 177, 183 (2d Cir. 1998) (district court specifically *granted stay*, and "much may remain for [it] to do following the arbitration").

[3] *See McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997), *petition for cert. filed* (May 26, 1998); *In re Pisgah Contrs., Inc.*, 117 F.3d 133 (4th Cir. 1997); *Altman Nursing v. Clay Capital Corp.*, 84 F.3d 769 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994).

[4] *See Nationwide Ins. Co. v. Patterson*, 953 F.2d 44, 46 (3d Cir. 1991); *Arnold v. Arnold Corporation-Printed Communs. for*

Thus, Respondents' "majority" is more of a *plurality* – a 4-3-3 split reflecting total confusion in the lower courts. Only this Court can dispel this confusion surrounding the interplay between the final judgment rule and the Federal Arbitration Act.

B. Resolution Of The Circuit Split Is Important To Litigants

Unable to deny the rift among the circuits, Respondents denigrate the impact these unsettled questions have on litigants. Distilled to its essence, Respondents' position is that even if several circuits have incorrectly interpreted the interplay between two federal statutes and continue to issue "wrong[ly]" decided opinions, that result is "unimportant." Opp. 15-16. Respondents are wrong.

The class in the underlying action comprises elderly victims allegedly cheated out of millions. They now face the specter of spending an estimated $3.75 million in the aggregate merely to exhaust their arbitral remedies so as to preserve their right to someday appeal the lower court's erroneous ruling. Pet. 8. Respondents' cavalier retort that Petitioners "do not suffer any prejudice" from the unsettled law, Opp. 15, ignores the realities of Petitioners' plight.

Even more important, resolution of the conflict is necessary to rationalize appealability doctrine for all litigants. Should the circuit split remain unresolved, litigants

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Business, 920 F.2d 1269, 1275 (6th Cir. 1990); *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 797 (10th Cir. 1995).

will enter the courts without the benefit of clear rules regarding finality and appealability of arbitration orders. Pet. 17-18. Appealability will not depend upon settled jurisprudence, but rather, upon the happenstance of the *location* of the circuit in which the action is filed – or in circuits without a rule, upon a guess as to *which* rule that circuit will embrace. As the law now stands, a final judgment coupled with an order to arbitrate in the Third, Sixth, or Tenth Circuits *will be* immediately appealable; an identical order, entered in the Fifth, Eighth, or Ninth Circuits *will not*. As to the remaining circuits – who can say with certainty? Respondents' claim that this Court's resolution of the fractured and confused jurisprudence among the lower courts will have no meaningful impact rings hollow. Only this Court, the "ultimate expositor of the meaning of the federal constitution and statutes," can resolve the rift among the circuits.[5]

Attempting to further bolster their "unimportance" characterization, Respondents gamely assert that parties moving for dismissals and arbitration will simply "be more vigilant" in seeking *stays* in the district court, supposedly ensuring that orders compelling arbitration will *always* be labeled interlocutory and unappealable. Opp. 16. Respondents' tidy scenario crumbles beneath the weight of the varied analyses found among the circuits: while a few appealability decisions *do* turn on whether a

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[5] Arthur D. Hellman, *The Supreme Court, The National Law, And The Selection Of Cases For The Plenary Docket*, 44 U. Pitt. L. Rev. 521, 522 (1983).

stay has been granted,[6] others focus on whether an arbitration claim is deemed "embedded" or "independent,"[7] several query whether the district court's dismissal was "without prejudice,"[8] and some simply ask whether the district court's decision was "final."[9] Moreover, there is no guarantee that a stay (rather than a dismissal) will issue merely because it is requested.[10] Federal judges have been known to show more independence than that.

C. The Rule In The Third, Sixth And Tenth Circuits Is Correct And The Decision Below Should Be Reversed

Although the merits are not essential to a grant or denial of certiorari, Respondents' impassioned defense of the decision below calls for a brief rebuttal.

By its plain language, Section 1291 mandates that the courts of appeals have jurisdiction over appeals of all *final decisions* of the district courts.[11] Respondents cannot deny the finality of the judgment below: the district court

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[6] *See, e.g., Armijo*, 72 F.3d at 797.

[7] *See, e.g., Gammaro*, 15 F.3d at 95.

[8] *See, e.g., Napleton*, 138 F.3d at 1212-14; *Seacoast*, 1998 U.S. App. LEXIS 9699, at *6.

[9] *See, e.g., Nationwide Ins.*, 953 F.2d at 46; *Arnold*, 920 F.2d at 1275.

[10] *See, e.g., McCarthy v. Providential Corp.*, No. C-94-0627 FMS, 1994 U.S. Dist. LEXIS 10122, at *27 (N.D. Cal. July 18, 1994) ("there is no reason to stay these proceedings pending the arbitrator's decision"); *see also Napleton*, 138 F.3d at 1210; *Arnold*, 920 F.3d at 1273.

[11] 28 U.S.C. §1291.

declared that "*none* of plaintiff's claims remain to be resolved by this court," *dismissed* the action, issued a *separate* judgment dismissing the case, and specifically ordered the clerk to *close the file*. Pet. App. 39a-41a. Because there was nothing left for the district court to do, its decision was final and appealable. *Arnold*, 920 F.2d at 1274-75.[12]

Finally, Respondents claim Petitioners seek "two bites at the same appellate apple." Opp. 14. On the contrary, Petitioners seek to avoid the waste and delay of plodding through thousands of *individual*, expensive arbitrations, only to be told later that the compelled arbitration was incorrect and that they must litigate their claims all over again in district court. If Petitioners obtain review at this stage, the collateral estoppel doctrine ensures that neither party will get a second "bite" at that "apple." *Blonder-Tongue Lab. v. University of Illinois Found.*, 402 U.S. 313, 328-29 (1971).

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[12] Arguing against finality, Respondents cite to a federal practice treatise and assert that a "flexib[le]" interpretation of Section 1291 is needed to fulfill the "pro-arbitration goals" of the FAA. Opp. 14-15. Flexibility should not override the clear dictates of Section 1291. This Court has long held that where a statute's language is *plain*, " 'the sole function of the courts is to enforce it according to its terms.' " *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Respondents would be hard pressed to find plainer language than, "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. §1291.

III. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: July 20, 1998

Respectfully submitted,

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No. 97-1895

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In The

Supreme Court of the United States

October Term, 1997

MARY McCARTHY, et al.,

Petitioners,

vs.

PROVIDENTIAL CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' RESPONSE TO THE SEPTEMBER 16, 1998 MOTION OF STEPHANÉ BOURCHIER DE CARBON, SOCIÉTÉ CIVILE DE GESTION DES ACTIONS DE CARBON, and SEACOAST MOTORS OF SALISBURY, INC. TO FILE BRIEF AMICUS CURIAE OUT OF TIME

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PETITIONERS' RESPONSE TO BRIEF AMICUS CURIAE

Petitioners in this case agree with *amici* that this case and three others with pending Petitions for Certiorari raise closely related questions regarding the appealability of a district court's dismissal of a complaint in favor of arbitration.[1] The fact that four separate Petitions have arisen out of recent decisions from three different Circuits illustrates the present state of disarray among the lower courts on the interplay between the Federal Arbitration Act and 28 U.S.C. §1291.

Petitioners also note that *McCarthy* was the first-filed Petition of the four, and involves a Ninth Circuit decision relied upon in *each* of the other three cases. Moreover, *McCarthy* presents a clear, compelling question: May a party appeal an arbitration order granted when the district court holds that "none of plaintiff's claims remain to be resolved by this court," dismisses the action, issues a separate, final judgment pursuant to Federal Rules of Civil Procedure 58 and 79, and unequivocally orders the clerk to "close the file"? Pet. App. 39a-41a. Thus, Petitioners respectfully suggest that this case is the proper vehicle to address this question.

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[1] The four Petitions for Certiorari are, *McCarthy v. Providential Corp.*, No. 97-1895; *De Carbon v. General Motors Corp.*, No. 98-189; *Napleton v. General Motors Corp.*, No. 98-279; *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, No. 98-415.

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No. 97-1895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARY McCARTHY, et al.,

Petitioners,

v.

PROVIDENTIAL CORPORATION, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Motion of Stephané Bourchier De Carbon, Société Civile De Gestion Des Actions De Carbon, and Seacoast Motors of Salisbury, Inc. To File Brief *Amicus Curiae* Out of Time and Brief *Amicus Curiae*

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RULE 29.6 DISCLOSURE

Amici have no parent companies or nonwholly owned subsidiaries.

MOTION TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

Stephane Bourchier De Carbon *et al.* and Seacoast Motors of Salisbury, Inc. respectfully move for leave to file this Brief *Amicus Curiae* out of time. *Amici* recently have filed two Petitions for Certiorari raising questions closely related to those presented by this case. *See* No. 98-189, *De Carbon v. General Motors Corp.*; No. 98-415; *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.* A Petition has also been filed in a third related case, No. 98-279, *Napleton v. General Motors Corp.* This Brief is presented to the Court out of time because these various petitions were not filed until the close of briefing on certiorari in this case. Counsel for Respondents have declined to consent to the filing of this Brief.

BRIEF AMICUS CURIAE

Amici file this Brief to advise the Court of three Petitions for Certiorari that are closely related to this case and to suggest that the Court straight-line the various related Petitions for consideration together at Conference. The question in this case is whether a district court's order dismissing a plaintiff's complaint in favor of arbitration is immediately appealable. The Ninth Circuit held that such an order was interlocutory and non-appealable. Pet. for Cert., No. 97-1895, at 4a-9a.

In No. 98-189, *De Carbon v. General Motors Corp.*, the Ninth Circuit applied its decision in this case summarily to hold that petitioners could not immediately appeal the district court's dismissal of their case. *See* Pet. for Cert., No. 98-189, at 19a. And in No. 98-415, *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, the First Circuit reached the same conclusion by expressly adopting the reasoning of both the Ninth Circuit in this case and the Seventh Circuit in *Napleton v. General Motors Corp.* *See* Pet. for Cert. No. 98-415, at 5a.

The First, Seventh, and Ninth Circuits all acknowledged a conflict with the Third, Sixth, and Tenth Circuits. *See Seacoast Motors,* 143 F.3d at 628 (acknowledging that Third, Sixth and Tenth Circuits "have determined that an order of dismissal accompanying an order favoring arbitration is appealable as a final decision, even if the proceeding is embedded"); *Napleton*, 138 F.3d at 1212 (7th Cir.) (2-1 decision) (acknowledging that "[b]oth the Tenth and Third Circuits have held that a dismissal in favor of arbitration is an appealable decision, even in an embedded proceeding"; citing also *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990)); *McCarthy*, 122 F.3d at 1243-45 (9th Cir.) (2-1 decision) ("*But see*" citation to decisions of Sixth and Tenth Circuits).

Amici suggest that the appropriate course in this circumstance is to relist this case, *De Carbon, Napleton,* and *Seacoast Motors* for consideration together at Conference. Although the questions raised by the four cases are quite similar, the cases themselves arise in a variety of factual settings. The fact that four cases are pending contemporaneously presents the Court with a unique opportunity to select the best vehicle to resolve the conflict among the circuits.

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